Exhibit B

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

CASE NO. 18-23538-rdd (Chapter 11)

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In re:

SEARS HOLDINGS CORPORATION, et al.

Debtors.

- - - - - - - - - - - - - - - - - x

U.S. Bankruptcy Court

300 Quarropas Street

White Plains, New York 10601

May 21, 2019

10:27 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: NAROTAM RAI

Notice of Agenda of Matters Scheduled for Hearing on May 21, 2019 at 10:00 a.m.

Application of Fee Examiner, Pursuant to Section 327(a) of the Bankruptcy Code, Bankruptcy Rule 2014, and Local Bankruptcy Rules 2014-1 and 2016-1, for the Entry of an Order Authorizing the Retention and Employment of Ballard Spahr LLP as Counsel to the Fee Examiner, Nunc Pro Tune to the Appointment Date filed by Paul E. Hamer on behalf of Fee Examiner(document #3682)

Motion of Debtors for Order Shortening Notice with Respect to Debtors' Motion for Authorization and Approval of (I) Settlement between Debtors and The Chubb Companies, (II) Debtors' Entry into the Transaction Documents, and (III) Related Relief (document #3615)

Debtors' Motion for Authorization and Approval of (I) Settlement between Debtors and The Chubb Companies, (II) Debtors' Entry into the Transaction Documents, and (III) Related Relief (document #3614)

Notice of Presentment of Debtors Motion for Authority to Assume Unexpired Leases of Nonresidential Real Property (document #3376) Objection of 7200 Arlington Associates LLC (document #3595)

Debtors Motion for Authority to Assume Unexpired Leases of Nonresidential Real Property (related document(s)3376)

Objection of 7200 Arlington Associates LLC (document #3595)

Notice of Presentment of Order (I) Authorizing Assumption and Assignment of Lease of Non-Residential Real Property and (II) Granting Related Relief, with Exhibit A (related document(s)3624, 3008, 3665, 3811)

Notice of Presentment of Stipulation among Buyer, Seller, and Brookfield Property REIT Inc. filed by Ryan Zachary Gelber on behalf of Transform Holdco LLC. (document #3913)

Motion of FTI Consulting Canada Inc., for Relief From the Automatic Stay for the Purpose of Joining Sears Holdings Corporation as a Defendant in Existing Litigation Pending Before the Ontario Superior Court of Justice (Commercial List) and to Liquidate Certain Claims Against Sears Holdings Corporation in Such Existing Litigation filed by Eric C. Daucher on behalf of FTI Consulting Canada Inc. (document #3237)

Motion of Liberty Insurance Corporation of Relief from the Automatic Stay (document #3294)

Motion of Rosa Melgar for Relief from the Automatic Stay (document #2960)

Motion of Apex Tool Group, LLC to Allow and Compel Immediate Payment of Administrative Expense Claim Pursuant to 11 U.S.C. 503(b)(1)(a) and 11 U.S.C. 503(b)(9) filed by Gregg M. Galardi on behalf of Apex Tool Group, LLC (document #1491)

Debtors' Omnibus Objection (document #3883)

Motion of Milton Manufacturing, LLC to Allow and Compel Payment of Administrative Expense Claim Under 11 U.S.C. §503(b) For Craftsman Branded Goods Delivered to the Debtor Postpetition filed by Joel D. Applebaum on behalf of Milton Manufacturing, LLC (document #1477)

Motion to Allow and Compel Payment of Administrative Expense Claim Under 11 U.C. Sec. 503(b) for Jaclyn Smith Branded and Private Label Goods Delivered to the Debtor Post-Petition (ECF #3323)

Debtors' Omnibus Objection (document #3883)

Motion of Gokaldas Exports Ltd. to Allow and Compel Payment of Administrative Expense Claims (document #3670)

Motion by Pearl Global Industries Ltd. to Allow and Compel Payment of Administrative Expense Claim (document #3604)

Notice of Assumption and Assignment of Additional Designatable Leases (related document(s)3008, 1731, 3097, 2753, 2314, 2995, 3152, 1774) filed by Luke A Barefoot on behalf of Transform Holdco LLC. (document #3298)

Transcribed by: Sherri L. Breach, Cert*D-397

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P R O C E E D I N G S

THE COURT: I just want to make sure, is the microphone on? Is the green light on?

MS. MARCUS: I think it -- the green light is green.

THE COURT: Yes. Okay. All right.

MS. MARCUS: The first item on the agenda this morning is an uncontested matter. It's the application of the fee examiner for the entry of an order authorizing the retention and employment of Ballard Spahr.

A certificate of no objection was filed by Ballard Spahr and I understand that the order was submitted to the Court on Thursday. We left it on the agenda, Your Honor, because it hadn't been signed yet. I know --

THE COURT: Okay.

MS. MARCUS: -- you had a busy weekend, so --

THE COURT: I think I may have set it in yesterday. In any event I'll grant it with the admonition or hope that most of the work here will be done by the fee examiner himself and that the law firm will be assisting him only on matters such as will be appropriate under the circumstances. I think Mr. Harner is quite an experienced lawyer and can do most of this work himself.

MS. MARCUS: Your Honor, Ms. Roglen is here on behalf of Ballard Spahr. I don't know if she --

THE COURT: No. I don't --

MS. MARCUS: -- wants to add anything.

THE COURT: I don't need anything else other --

MS. MARCUS: Okay.

THE COURT: -- than that. So that order will get entered shortly.

MS. MARCUS: Okay. Thank you, Your Honor.

Items 2 and 3 on the agenda, Your Honor, should be taken together. Item 3, going a little bit out of order, is the debtors' motion for authorization and approval of a settlement between the debtors and the Chubb Companies, and the debtors' entry into certain transaction documents related to that.

The Item Number 2 on the agenda is the most to shorten time related to that motion.

THE COURT: Right.

MS. MARCUS: We haven't had any objections to either the substantive motion or the request for the order shortening time.

THE COURT: Okay. I will grant the motion to shorten. As most of you know my practice is not to grant these ex parte unless I absolutely have to do, and to do something in between which is -- if I think there's a potential basis to shorten I'll schedule the hearing on the motion to shorten with the same time as the underlying

relief, giving people a chance to say this should be heard on longer notice.

But that wasn't the case here. So I'll grant that motion.

I've reviewed the underlying motion as well. I guess the only issue is the dollar amount, everyone is agreed that's the potential exposure? There's no more risk for the debtor in any event?

MS. MARCUS: That's correct, Your Honor. The --

THE COURT: And --

MS. MARCUS: The arrangements basically replace the insurance that the debtors had through Sears and through a Chubb affiliate --

THE COURT: Right.

MS. MARCUS: -- with a new direct policy. So the total amount of coverage is the same and there's no cost to the debtors. It just stayed the same.

THE COURT: Right. It's just a pass through transaction.

MS. MARCUS: That's correct.

THE COURT: So I will grant that motion. You can email both of those orders to chambers.

MS. MARCUS: Thank you, Your Honor.

Item 4 on the agenda, Your Honor, is the debtors' motion which was originally framed as a motion for authority

to assume unexpired leases of non-residential real property, ECF Number 3376. It pertains to three leases relating to property located in Riverside, California.

These leases were not sold to transform pursuant to the asset purchase agreement. At the time we filed the motion we were cognizant of the impending 365(d)(4) deadline and we didn't have a proposed transaction in hand that was signed and ready to be filed with the Court.

You might recall, Your Honor, that at the hearing on May 8th I mentioned that we might be amending the relief sought in that motion.

After we filed the motion we were able to enter into an agreement for the assignment of the lease with Brixton Capital. When the landlord for the property, which had objected to the assumption motion, learned of the proposed transaction it indicated that it was prepared to outbid Brixton.

Last Thursday, May 16th, we had what I'll call a mini-auction for the property, and after two rounds of bidding the landlord emerged as the successful bidder.

As a result on Friday we filed a notice of hearing together with a supplement to the motion changing the relief requested to approval of the assumption and assignment of the leases to the landlord's designee, and we also filed a revised proposed order that provides the requested relief.

I might add, Your Honor, that the professionals for the creditors' committee were kept in the loop as this process unfolded. And I think they were supportive of the debtors' approach.

THE COURT: Okay.

MS. MARCUS: As reflected in the supplement the landlord has agreed to pay the debtors' $1,265,000 for the leases and to waive any cure payments or adequate assurance of future performance.

In addition to seeking the authorization to assume and assign the leases, the debtors are seeking authorization to pay Brixton Capital $30,000 in legal fees. The debtors had agreed to seek such authorization in order to persuade Brixton to participate in the auction.

Brixton's interest in the property and its participation in the auction clearly enhanced the value provided to the debtors' estates. Consequently, we believe that payment of the fee is appropriate under Section 363 of the Bankruptcy Code.

THE COURT: Right. And Brixton's bid was -- it went up to a 1,130,000 and that enabled the auction to happen.

MS. MARCUS: That's correct, Your Honor.

THE COURT: Okay. Does anyone have anything to say on this motion?

All right. I will grant the modified relief requested by the debtors approving the -- in essence the sale of the lease to the landlord on the terms outlined and the payment of the $30,000 to the -- to Brixton --

MS. MARCUS: Thank you, Your Honor.

THE COURT: -- that facilitated the auction.

MS. MARCUS: Thank you.

Item Number 5 on the agenda will actually be handled by Mr. Barefoot on behalf of Cleary.

THE COURT: Okay.

MR. BAREFOOT: Good morning, Your Honor. Luke Barefoot from Cleary Gottlieb Steed & Hamilton for Transform Holdco and its affiliates.

THE COURT: Right.

MR. BAREFOOT: Your Honor, on Agenda Item Number 5, this concerns Store Number 26741 in Amherst, New York. Your Honor may remember at the conclusion of the assumption and assignment hearing on May 8th there was a brief discussion about this property. We had filed a -- what was then a pending stipulation to extend the time under Section 365(d)(4). The designee, Transform's designee needed to take assignment of the lease objected to that extension. It was entered into with the current landlord.

I'm pleased to report that that objection was subsequently resolved by a revised stipulation that provided

for shorten time for the landlord to file its cure cost objections. Those cure costs have now been agreed to between the designee and Transform. And we submitted a revised form of order that's substantially in the form that Your Honor entered on May 8th, but that is tweaked to address the specific circumstances of this lease.

That proposed order was submitted on notice of presentment at Docket Item 3939. Like some of our other notices of presentment this was noticed for hearing today, not in compliance with the time requirements that would otherwise apply under the case management order.

THE COURT: All right. Let me just make -- what is left then with regard to this lease? Any -- are there any -- there -- what open disputes, if any, are remaining?

MR. BAREFOOT: There are none, Your Honor.

THE COURT: There are none.

MR. BAREFOOT: This is an entirely consensual one.

THE COURT: So the landlord's -- put it differently, the stipulation I thought provided deadlines for certain things to happen and the hearing to happen in case there were objections. But, in fact, there are no objections?

MR. BAREFOOT: There was an objection from the landlord that asserted approximately $9,000 in cure costs. Transform has agreed to pay those cure costs --

THE COURT: Okay.

MR. BAREFOOT: -- as part of the transaction with the designee.

THE COURT: All right. Very well.

I just want to make sure, does anyone want to be heard on this motion?

All right. I'll grant the relief as modified including the shortened notice given the context here. So you can submit that order to chambers.

MR. BAREFOOT: Thank you, Your Honor.

THE COURT: Okay.

MR. BAREFOOT: With Your Honor's permission I would like to take something that was on the contested portion of the calendar out of order.

Item Number 17 on the contested portion, it concerns Store Number 7471 in Placerville, California. I'm pleased to report that this is now an entirely consensual assumption and assignment.

Your Honor, there was a stipulation entered by the Court on May 13th at Docket Item 3852 that provided for an extension of time to assume or reject and to address the landlord's objections on a number of grounds, including cure and adequate assurance.

That stipulation set the hearing on the assumption and assignment of the Placerville lease for today. I'm

pleased to report that we have agreed on a form of order that again substantively mirrors in all respects Your Honor's order entered on May 13th with respect to the bulk of the leases.

That was set down for hearing today, so it has not been filed on notice of presentment, but it has been agreed to by the landlord, the debtors and Transform. And with Your Honor's permission following the hearing we would propose to submit it to chambers.

THE COURT: Okay. And that, again, is the matter that appears on 17 on the agenda?

MR. BAREFOOT: That's correct, Your Honor.

THE COURT: The cure objection --

MR. BAREFOOT: I would just like to --

THE COURT: -- cure objection of Alan Robbins?

MR. BAREFOOT: Correct, with respect to the --

THE COURT: And so that's --

MR. BAREFOOT: -- Placervile, California --

THE COURT: All right. So that's been resolved.

All right. Very well. So I'll look for that once the notice period passes.

MR. BAREFOOT: Thank you, Your Honor.

I would propose to turn the podium over to my colleague, Zack Gelber, who will address Item Number 6.

THE COURT: Okay.

MR. GELBER: Good morning, Your Honor. Zack Gelber on --

THE COURT: Good morning.

MR. GELBER: -- behalf of Transform Co from Gelber & Santillo as conflicts counsel.

We are here on a notice of presentment of a stipulation between the debtor and Transform as buyer and Brookfield REIT.

THE COURT: Right.

MR. GELBER: The parties have agreed consensually and there have been no objections to two main points. One is to extend the hearing date from today, May 21st to May 29th with respect to any disputes. And the second is that Exhibit A to the May 13th order had erroneously designated eight leases for assignment and assumption that the parties all agree were designated erroneously. We would like to remove those consensually and set them down with the other leases between Brookfield and the debtor for May 30 -- for the May 31st deadline for the debtor to determine whether to assume those leases.

THE COURT: Okay. Very well.

MR. GELBER: I would note, Your Honor, this is also on a less than the eight days required under the case management order.

THE COURT: Right, but essentially it's an

adjournment and --

MR. GELBER: Yes.

THE COURT: -- you can email that order to chambers. I'll grant it.

MR. GELBER: Thank you, Your Honor.

THE COURT: Okay.

MS. MARCUS: That brings us, Your Honor, to the contested matters for today's hearing, and the first one is the motion of FTI Consulting Canada.

THE COURT: Can I -- I understood that the next one that's Number 8 on the agenda was actually adjourned, motion of William Juiris; is that --

MS. MARCUS: That's correct --

THE COURT: -- right?

MS. MARCUS: -- Your Honor.

THE COURT: All right. So --

MS. MARCUS: That happened late yesterday.

THE COURT: Okay. So then we should -- I just want to make sure there's no one on the phone or no one here on that matter.

Then let's go back to the FTI Consulting lift stay motion.

MR. DAUCHER: Good morning, Your Honor. Eric Daucher from Norton Rose Fulbright on behalf of FTI Consulting Canada Inc. --

THE COURT: Good morning.

MR. DAUCHER: -- in its capacity as court-appointed monitor for Sears Canada Inc. and a number of its affiliates in proceedings under Canada's company's creditors arrangement which is currently pending before the Ontario Superior Court of Justice Commercial List.

With me in the courtroom today are U.S. Counsel for the monitors co-movants. We have Neil Oxford of Hughes, Hubbard & Reed who is here on behalf of the litigation trustee and also the class action representatives. And we have Laura Hall of Allen & Overy who is here on behalf of the Pension Plan Administrator.

THE COURT: Okay.

MR. DAUCHER: We are before Your Honor today of course on the Canadian plaintiffs', as we are calling ourselves, motion for relief from the automatic stay.

That motion is supported by a declaration from Mr. Steven Bissell (ph) of FTI Consulting Canada, again, in its capacity as monitor of Sears Canada. We would like to begin by moving Mr. Bissell's declaration into evidence. Mr. Bissell is in the courtroom here today and is available for cross-examination as necessary.

THE COURT: Okay. Does anyone have any objection to that?

MS. MARCUS: Your Honor, on behalf of the debtors

Jacqueline Marcus again. The debtors do take issue with some of the statements in Mr. Bissell's declaration. But given that those statements are immaterial to the resolution of the motion today we will forego our opportunity to cross-examine.

THE COURT: Okay. I think you had pointed out some of those already. But in any event I'll -- I read the declaration and I'll admit it.

MR. DAUCHER: And we have extra hard copies available if Your Honor would like a hard copy, otherwise we can just proceed.

THE COURT: That's okay.

MR. DAUCHER: Okay.

And, Your Honor, as we set out in the motion the Canadian plaintiffs are in the midst of a litigation before the Canadian Court related to what we've termed the 2013 dividend. And that was a transfer which was approved in November 2013 of approximately $509 million Canadian dollars from Sears Canada to its shareholders, including Sears Holdings.

And although the Canadian plaintiffs each have distinct claims related to that transfer, because the Canadian Court has recognized the importance of efficiency here, all of the claims are being jointly case managed together. That's currently set for a trial scheduled to

kick off beginning on February 3rd of 2020.

Now the missing piece of that litigation, the one thing that really prevents all of the Canadian plaintiffs' claims from being definitively resolved in a single proceeding in a single forum is the absence of Sears Holdings as a defendant.

And the reason for that absence is the potential application of the automatic stay which the Canadian plaintiffs have been careful to respect.

THE COURT: Can I interrupt you on that?

MR. DAUCHER: Of course.

THE COURT: It's clear to me that a fair amount has already happened in these three actions. In fact, one of them has been pending for some -- well, for four years. There's a discovery schedule with document production to be complete by June 30th. Depositions scheduled tentatively for September 2019, and as you said a joint trial for February.

That suggests to me perhaps that while taking discovery from Sears Holdings may be important, the parties -- it didn't jump out at the parties that having Sears Holdings as a live defendant was important because it seems like they proceeded without them for a while at least.

MR. DAUCHER: On that, Your Honor, and I -- my colleague will ultimately speak a little further on the

current status of the Canadian litigation. But I can say a few things, which is Sears Holdings wasn't initially named as a defendant in three of the actions --

THE COURT: Right.

MR. DAUCHER: -- specifically because of the automatic stay. In the fourth action, the one that has been pending for a great deal of time, Sears Holdings was named as a defendant and that was only voluntarily stayed as against Sears Holdings.

In addition, Sears Holdings has been participating in those proceedings, I won't say quite from the beginning, but from the early stages. They've been on the service list. Their lawyers have appeared. In fact --

THE COURT: But not since the start of the bankruptcy -- of this Chapter 11 case?

MR. DAUCHER: Oh, no. Even since the start of these Chapter 11 cases.

THE COURT: Okay.

MR. DAUCHER: In fact, if you look at Exhibit D to our reply brief you'll see an order issued by Justice McCughen (ph) holding in abeyance additional progress in the litigation upon the motion of Sears Holdings pending disposition of this motion.

So the parties were aware. Sears Holdings was certainly aware that it could ultimately end up in this

litigation. The Canadian Court has taken steps to ensure this is written down in black and white that Sears Holdings is not prejudiced by the current advancement of the litigation and that it's just being held up until this motion is resolved.

THE COURT: Okay.

MR. DAUCHER: Frankly, Your Honor, we initially hoped that this motion wouldn't be necessary. We thought that what we were proposing, that Canadian plaintiffs' claims can be resolved in one trial, one proceeding, one court. It made so much sense that we could do this on consent. Unfortunately, after a couple of weeks of consideration -- and we did give the debtors and the committee weeks to consider this -- they turned us down.

So let's talk a little bit about why we believe this makes so much sense.

First, we think that one litigation is better than two. Why would we want to expend limited estate resources, not just of one estate, we have insolvent estates on both sides of the border pursuing two litigations when you could have one? Why would we want to take up court time of two busy courts rather than one running through two proceedings? And why would we want to create a risk of inconsistent judgments on the very same questions of fact and the very same questions of law by heading into two proceedings? We

don't.

Second, we think it makes sense to defer to the Court with the greater expertise in the particular claims at issue in the Canadian litigation. And we're already before a specialized Canadian Court with enormous expertise in the particular types of Canadian law causes of action that the Canadian plaintiffs are pursuing.

Why would we put this Court in the position of having to second guess the decisions of a Canadian Court? Why would we put the parties in the position of potentially having the decisions of the Canadian Court second guessed on issues of Canadian law? Again, we wouldn't.

Given that posture, we think that the SONOX factors overwhelmingly favor relief from the automatic stay. I know Your Honor is familiar with those factors and I'm not going to rehash them. We've set out in -- at length both in our motion papers and our reply why we believe the factors overwhelmingly favor granting relief from the stay for the limited purposes that we've requested.

THE COURT: Which is to liquidate the claim?

MR. DAUCHER: Which is purely to liquidate the claim.

THE COURT: And as I understand it at this point the claim is -- you've -- not all the plaintiffs, but a claim has been filed in this case based on the facts or some

of the facts that are asserted in the pending actions. But it's a general unsecured claim. It's not for a specific property, right?

MR. DAUCHER: That's correct, Your Honor.

THE COURT: Okay.

MR. DAUCHER: And I will say I believe each of the four plaintiffs have, in fact, submitted claims in these cases.

The debtors and the committee apparently disagree with our plan. They don't seem to think that one litigation is preferable for -- to two. And yet when we read their objection and then we -- when we read the committee's joinder what we were really struck by is the number of our core assertions that went entirely unanswered.

So, for example, with one narrow exception related to a punitive damages claim the debtors and the committee don't actually dispute that granting relief from the stay would allow all of the Canadian plaintiffs' claims to be resolved as against all parties. That's factor one.

Now we concede that the debtors have raised a good point on the punitive damages claim and it's for that reason and to ensure that the Canadian Court can, in fact, resolve the issue as against all of the parties fully without further action before this Court that the Canadian plaintiffs are willing to waive their punitive and exemplary

damages claims as against Sears Holdings.

So with that I think the debtors' concerns on that front are fully resolved.

Next, there's no suggestion that lifting the automatic stay will delay distribution in these cases. To the contrary, waiting to resolve the Canadian plaintiffs' claims until after the adversary proceeding is resolved, that's a recipe for delaying creditor --

THE COURT: Well --

MR. DAUCHER: -- distributions

THE COURT: -- when you say the adversary proceeding you mean the ones that started here?

MR. DAUCHER: Correct. The adversary proceeding as the debtors have defined in their objection.

THE COURT: Okay.

MR. DAUCHER: And that -- waiting until that is resolved seems to be what they're driving at as they say repeatedly, well, we need to determine what creditor recoveries are before we can move forward (indiscernible). Then we've got a very long sequence of events and it's going to be an awfully long time before our claims are liquidated. All the while we have a Canadian insolvency estate that has completed virtually every task. Resolving this asset is one of the few remaining tasks that needs to be done in Canada and it's just not right to hold that open for potentially

years on end when the issue could be resolved in a timely manner.

THE COURT: Can I -- I just want to make sure, the claims against Sears Holdings is -- I'm going to use shorthand. It's essentially a fraudulent transfer claim, right? I mean, that's not the term under Canadian law, but it's essentially a fraudulent transfer claim?

MR. DAUCHER: The monitor's claim I would say is most similar to what we would call a constructive fraudulent transfer claim. That's --

THE COURT: Right.

MR. DAUCHER: That's correct. There are differences between Canadian law and U.S. law on that front obviously. But the monitor's claim at least is most like a constructive fraudulent transfer claim.

The pension party's claims are substantially different. There you're talking about complex and evolving breach of fiduciary duty claims. There is a relatively recent case from the Canadian Supreme Court that apparently really started the wheels turning in this area of Canadian law. So I won't venture to say what that's most similar to, but it's substantially different from a fraudulent transfer claim.

And the litigation trustee and the class action representative have different claims, too.

THE COURT: So Holdings was a substantial shareholder --

MR. DAUCHER: That's correct.

THE COURT: -- and received a substantial dividend.

MR. DAUCHER: That is correct.

THE COURT: It's a fiduciary to whom or is that what's evolving in Canada?

MS. HALL: If I could address that?

MR. DAUCHER: I'll cede the podium momentarily to my colleague, Laura Hall.

MS. HALL: Hi, Your Honor. I'm Laura Hall for the pension administrator.

THE COURT: Right.

MS. HALL: The theory there is Sears Canada itself was administering its own pension plan. And in connection with issuing the distribute -- the dividend at issue it's alleged that the shareholders of Sears Canada induced and aided and abetted its breach of its fiduciary duties to the plan.

THE COURT: Who -- when you say its, who do you mean?

MS. HALL: So Sears --

THE COURT: Sears --

MS. HALL: -- Canada had fiduciary duties as

administrators --

THE COURT: Right.

MS. HALL: -- of its own plan. The directors of Sears Canada and its shareholders who are in -- you know, the ESL parties and the shareholder being Sears Hold Co. are alleged to have induced Sears Canada --

THE COURT: So it's like an aiding and --

MS. HALL: -- to give the --

THE COURT: It's an aiding and abetting --

MS. HALL: Exactly.

THE COURT: -- of breach of fiduciary duty.

MS. HALL: Yeah.

THE COURT: Okay. And this is an evolving concept under Canadian law?

MR. DAUCHER: That's correct, Your Honor.

THE COURT: Okay.

MR. DAUCHER: So the delay in distributions, that's, I think, factor two in our favor.

There's also no dispute that the Canadian plaintiffs' claims are largely focused on the conduct of third parties, although we apparently have a quibble around how broad or narrow Factor 6 is. But we think that's Factor 6 in our favor.

The debtors and the committee acknowledge that the Canadian litigation will not result in a subordinated claim

and will not result in avoidable judicial lien. That's Factors 8 and 9 in our favor.

And perhaps most importantly the debtors admit that granting relief from the stay would avoid needless and duplicative litigation. That's Factors 7 and 10.

Their only complaint on that front seems to be that granting relief from the stay will not also resolve their own adversary proceeding. But the debtors admit that adversary proceeding arises from --

THE COURT: I --

MR. DAUCHER: -- different facts.

THE COURT: I actually don't think that's their main issue. I think their -- well, Ms. Marcus can tell me, but I think their main issue is they think that the Sears Holdings part of this litigation is not particularly important in the Canadian context, but would cost a lot of money at this point that may not be well spent by anybody on either side given the uncertainty about the level of distributions.

It's not really -- I don't see -- maybe I'm missing it. I don't see a tie in whereby issues in the adversary proceeding in front of me will be determined in the Canadian litigation. So I don't think that's their issue. I think it's just a --

MR. DAUCHER: But they actual --

THE COURT: -- a money issue.

MR. DAUCHER: But they actually -- I agree that they are separately raising a money issue. But they actually make the point repeatedly in their brief that, and we're looking at paragraphs 27 and 70 in their brief where they acknowledge that granting relief from the stay will eliminate duplicative litigation for the Canadian plaintiffs, but will not resolve it, will not eliminate duplicative litigation for the debtors. And they specifically cite the existence of the adversary proceeding.

So that may not be convincing. I agree it's not convincing. But it's what they put down on -- in their papers.

THE COURT: Okay.

MR. DAUCHER: And I agree as well when you say that it doesn't seem that resolving issues in Canada will resolve issues in the adversary proceeding or vice versa. That's right. The debtors admit that the adversary proceeding arises from different facts than does the Canadian litigation. We couldn't agree more. They're separate.

But we think those unanswered points alone are sufficient to establish at least a prima facie case for relief from the automatic stay. But I think it's worth looking in detail at what the debtors and the committee to

some extent have raised in opposition.

First they suggest that the motion should be denied because granting the Canadian plaintiffs relief from the stay risks affording us some sort of improper distributional advancement. That's just not correct. As Your Honor observed at the outset, what we've done is request relief from the stay, to add Sears Holdings as a defendant, and to liquidate our claims. Any claim that we ultimately obtain against Sears Holdings is going to have to ultimately be recovered through these Chapter 11 cases.

And there are any number of decisions from courts in this district, from courts elsewhere in the Second Circuit that make the point that prejudice to any other creditors is managed or eliminated by limiting a request for relief from the stay purely to liquidating that -- liquidating the claim in another forum.

THE COURT: I think that overstates it, but that's fine.

MR. DAUCHER: I'm looking specifically at --

THE COURT: No. But you wouldn't spend $100 to liquidate a claim that's only going to get five. So it depends.

MR. DAUCHER: It does, Your Honor. And I think the math there is instructive. We have $500 million Canadian dollars on the table in these disputes, slightly

more than that. Even at the two and a half percent recoveries that the debtors are currently projecting, and the debtors are projecting recoveries for unsecured creditors, but even at that two and a half percent recovery level, that's twelve and a half million dollars Canadian of potential recoveries on these claims.

The entire litigation budget in Canada for not just Sears Holdings, but the entire litigation as against all the parties is publicly disclosed at 12 million Canadian which includes incidentally the buffer for adverse costs. So this piece of the claim alone, even if recoveries really are as low as two and a half percent, stands to entirely cover the cost of the entire litigation in Canada, not just against Sears Holdings.

So if it's a cost benefit analysis this Court's performing, we're clearly on the right side of that analysis.

I've already discussed a little bit the debtors' point or the debtors' suggestion that we need to somehow eliminate all potential other litigation, whether we need to solve the adversary proceeding for them by granting it through relief from the stay. Obviously we don't think that's right. But it's worth looking at just how very different these transactions are, these litigations are, excuse me.

The Canadian litigation and the adversary proceeding concern different events, arise under different law, and have the debtors in opposite postures. In the adversary proceeding the debtors are attacking any number of transactions. They're not attacking the 2013 dividend. That's why the debtors admit that "the claims in the adversary proceeding and the dividend litigation" -- meaning the Canadian litigation -- "arise from different events." That's the debtors' objection at paragraph 29.

And again at paragraph 70, "The transactions at issue in the dividend litigation and the adversary proceeding differ."

The adversary proceeding also asserts causes of action under the Bankruptcy Code, Delaware law, New York law, Illinois law, but not Canadian. The Canadian litigation, by contrast, involves claims exclusively under Canadian law. So Canadian law isn't something this Court would have to determine if relief from the stay is granted.

Then in the adversary proceeding, this is maybe the most obvious point, the debtors are the plaintiffs. They're asserting that various wrongdoing occurred to -- related to all of these different transactions and that assets were stripped out of the U.S. debtors.

In the Canadian litigation, by contrast, Sears Holdings would be a defendant who would presumably be

arguing that no such wrongdoing occurred with respect to the 2013 dividend in which assets were taken from Sears Canada and transferred to Sears Holdings.

And as I began with, it's simply not our burden to solve every piece of litigation the debtors are involved in. We need to reduce duplicative litigation and the debtors have admitted in black and white at paragraph 70 of their objection that granting relief from the stay would eliminate at least some duplicative litigation. So I think that's another point in our favor.

Now, third, they've claimed that the Canadian Court is not the specialized tribunal and I've got to say I found this one surprising. In support of that assertion they pointed to the website of the Ontario Superior Court of Justice as a whole, which indicates --

THE COURT: No. The issue is not the nature of the court. It's the application of Canadian law.

MR. DAUCHER: Correct. Specific types of -- so specific types of Canadian law claims and whether that particular court is the best suited to handle it. And there, you know, we could walk through it at length. We've laid it out in our reply brief. But I think what's most telling is you have a decision from the Ontario Court of Appeals which says "The commercial list is a specialized court." And that it's entitled to "deference even from

Canadian Appellate Courts." That's the Western Large case that's attached as Exhibit A to our reply brief.

So the question is whether this litigation is currently pending before a specialized tribunal with expertise in these areas, complex questions of Canadian commercial law, complex questions of Canadian insolvency law. The Canadian appellate courts themselves have said in black and white, yes, the commercial list is that court, not the Ontario Superior Court as a whole, but the commercial list where this litigation is pending, unquestionably a specialized court.

But we can go further than that, which is that the debtors have acknowledged that the factor may weigh in our favor if it doesn't just involve -- if the litigation doesn't just involve garden variety causes of action under Canadian law, but whether there's unsettled questions of Canadian law. And the monitor's publicly disclose, and this was in its 27th report, it's also mentioned again in our reply brief, that it's claim involves an important question of Canadian law as to which there is very little precedent. And that's whether a trans -- whether a dividend, such as the 2013 dividend, can as a matter of law constitute a transfer at an under value.

The pension administrator's claims as we discussed a little bit earlier also involve awfully complex and

rapidly evolving questions of Canadian law.

And given that these are both complex questions, unsettled questions, frankly, important questions of Canadian law it would just be improper for any U.S. Court to get out ahead of the Canadian courts on the issues or to second guess what the Canadian courts are doing.

So to be clear, the Canadian plaintiffs don't dispute that in the right circumstances it's appropriate for this Court to decide issues of Canadian law. We know Your Honor is capable of doing that. It's just that this isn't the right context. We have a specialized Canadian court. We have evolving and complex questions of Canadian law. And we have a litigation on these very legal issues and these very facts that's already going forward. The right thing to do is to make sure that the court with the greatest expertise in these particular issues and facts is the one that manages the whole litigation. That's unquestionably the Canadian court.

The debtors have fourth argued that somehow granting our motion would open the flood gates to additional motions for relief from the stay. That's a general assertion. They could and do make it in support of any number of oppositions to motions for relief from the stay. It's not particularized our facts at all. It should be given no weight.

It also ignores the fact that to the extent there's a risk of flood gates being opened, I would say those flood gates are opened. Last I checked they've already filed three omnibus objections to motions for relief from the stay. People aren't shy about filing those motions, and granting our motion isn't going to encourage them any further.

But it also just ignores the Canadian plaintiffs are situated differently and, frankly, the debtors know this which is why they're filing individual objections to our motion whereas we're not -- and rather than lumping us into the omnibus objections.

The Canadian plaintiffs are not individual self interested as they termed us creditors looking to obtain an advantage. We're fiduciaries or court officers representing very broad constituencies involved in the proceedings of Sears Canada. This Court, courts in this district, have regularly recognized that Canadian monitors act with fiduciary duties to all stakeholders.

We're here in furtherance of those duties, trying to make sure that the Canadian plaintiffs' claims are litigated in as efficient a manner as possible. And we come with orders from the Canadian court respectfully requesting that this Court extend assistance to the monitor, to the litigation trustee, in execution of those duties.

So it's just simply not the case that there's this potential avalanche I think was their term of similarly situated parties waiting to file motions. The Canadian plaintiffs stand apart of it.

And, anyway, the debtors in this court are more than capable of dealing with motions from non-similarly situated parties who don't deserve relief from the stay.

And, finally, and I know I've taken up a fair amount of time, the debtors and the committee have suggested that the motion is premature, that the Court should give them more time to determine creditor recoveries before allowing us to proceed.

They've already at least projected that there will be meaningful creditor recoveries as we discussed. And counsel for the monitor's co-movant, the litigation trustee, can, if the Court is so inclined, provide some additional detail on the current status of the Canadian litigation and why it's very important that we receive relief at this time.

I'll simply say this. The Canadian litigation needs to move forward, and if it doesn't move forward now, we risk losing this one narrow opportunity to capture cost efficiencies by having everything resolved in one single proceeding.

Unless Your Honor has any further questions.

THE COURT: Well, I would like to hear the current

projection of the schedule of this litigation if I granted the motion.

MR. DAUCHER: I'll cede the podium to my colleague --

THE COURT: I mean, it's --

MR. DAUCHER: -- Neil Oxford.

THE COURT: -- already the third week of May and document discovery is kind of ready to be done by the end of June. So I just want to get a sense of how realistic that is.

MR. DAUCHER: Thank you.

MR. OXFORD: Good morning, Your Honor. Neil Oxford of Hughes, Hubbard & Reed for the litigation trustee, Douglas Cunningham, and for the class representative as well.

Picking up on your last question to Mr. Daucher, the time table will be unaffected if Your Honor were to lift the stay and Sears Holding was to be joined as a defendant in the litigation. As Mr. Daucher mentioned there was a hearing in front of Mr. -- Justice McCughen in April where Sears Holding appeared and requested not an adjournment of the whole proceedings, but an adjournment simply of certain motions to strike pending the outcome of the motion that this Court is hearing today.

Out of respect for judicial economy and principles

of comity Justice McCughen granted that motion. That did not, I think, Mr. Daucher mentioned that the proceedings in Canada are being held up. I would say it differently. I think that's actually not correct. Mr. -- Justice McCughen made no adjustments to the overall timetable. That overall timetable remains in place. As Your Honor has suggested there's going to be discovery very shortly and the various interim steps between now and trial --

THE COURT: Have the parties taken discovery of anyone else as -- to meet the June 30th deadline?

MR. OXFORD: I don't believe so.

THE COURT: Okay. All right.

MR. OXFORD: I don't believe so. But just on that point, Your Honor, as I understand it Justice McCughen at that hearing has stated that if the timetable were to slip for any reason, and we all agree it's a fairly aggressive timetable, it would slip only by a matter of weeks. So we're still looking at a trial in the spring of 2020.

THE COURT: Okay. And why -- there's two months in between close of document discovery and deposition. Is that customary or is that just because it's summertime or --

(Laughter)

MR. OXFORD: Having (indiscernible) in Canada I don't remember getting a summer off, Your Honor.

THE COURT: Okay.

MR. OXFORD: The discovery works a little differently than it does down here, so there's not -- there are depositions as I understand it or examinations of a -- of representative witnesses and then there's a slightly complicated and to me unfamiliar process of sorting out the objections to that testimony and filling in blanks in that testimony.

So I think that may be why there's that gap.

The other point I did just want to mention is that Canadian counsel for the U.S. debtors when they appeared before Justice McCughen repeatedly assured the Court that if leave was granted to lift the stay and to join Holdings as we urge the Court to do, they would try hard not to blow up the schedule and would work to fit in within existing timetables.

So as I understand it we are looking very fairly, very squarely at a spring trial in Canada against the (indiscernible) existing defendants. And in our submission it makes much more sense to do that against defendant number 15 as well.

THE COURT: Okay.

MR. OXFORD: Just to pick up on one other question that the Court asked Mr. Daucher, which is why Holdings was not joined kind of ab initio and whether there should be any negative inferences from that, I think the Court was

wondering whether that was indicative of their relative importance, I would submit not.

The short answer to your -- Your Honor's question is that at the time these claims were approved by the Canadian Court which was late December of 2018 there was still an ongoing sale process. The bankruptcy in the United States was still in a, really in its infancy. And we thought it was more appropriate to wait until the sale had been confirmed and a plan was in place for -- to appear before Your Honor and to request relief from the stay.

So it was really out of respect for the ongoing Chapter 11 process. And it's also really just a matter of months. We're talking less than three months between when the Canadian claims were allowed to go forward against the other 14 defendants and when we first started discussions with the U.S. debtors and the UCC to add the 15 defendants.

So in my submission no negative inference can or should be made.

THE COURT: Okay.

MR. OXFORD: Okay. So I think I've probably covered a lot of what I was intending to say already, so I'll be as brief as I can. I just have three points.

The first one is that despite their efforts to suggest otherwise, the U.S. debtors are by no means a stranger to the Canadian litigation. They have been

monitoring it since the get go.

In December 3, 2018 there was a hearing in front of Justice Haney concerning the appointment of the litigation trustee and permission for the monitor to proceed with the transfer at undervalue claims. And we were in attendance at that hearing.

After the litigation was approved, as I think Mr. Daucher mentioned, there was a request by Holdings canceling Canada to be added to the service list, which happened. As I mentioned in mid-March we started discussions with the UCC and with the debtors in the hope that they would agree to this motion.

So in short answer what's been going on in Canada is a process that has not been foreign by any means to the U.S. debtors. They've been very aware of what's been going on really for the last six months.

THE COURT: Okay.

MR. OXFORD: That leads to my second point which is there is no reason to delay a decision on the stay. The U.S. debtors and the UCC have had plenty of time to make up their mind. They've had six months, in fact. They don't need any more time. They know exactly what those claims are and they can take their position on that.

I would suggest, Your Honor, that that is of particular importance here where a delay is essentially a

denial of the motion. We have a limited opportunity. The bankruptcy universe has aligned such that it is an appropriate time to join Holdings to the existing litigation without suffering any meaningful delay up there, if any delay at all.

But that window is closing. The train is leaving the station. The horse is about the leave the barn. Pick your metaphor, whatever you want. It's a one-time opportunity that the Court has here.

That brings me to my third point, that this motion is a real opportunity for this Court to save a very significant amount of judicial resources and of the parties' resources. We're off to the races in Canada. It's set down for an eight week trial, complicated issues, four claims, many witnesses, probably a dozen or more witnesses. We're going to be doing that in Canada in February, certainly in the spring of 2020. And then if the stay isn't lifted, we're going to come back down to White Plains and we're going to do it all again.

THE COURT: You won't have an eight week trial, that's for sure.

(Laughter)

MR. OXFORD: Something of a relief to me, Your Honor.

So in my respectful submission it's hard to think

of a more clear cut waste of the parties' resources.

The U.S. debtors admit that it's a waste of the Canadian parties' resources and they say, in Canada that doesn't matter. Respectfully, we disagree. As Mr. Daucher says, it matters a great deal. The parties who are before you represent the creditors of the Sears Canada bankruptcy estate. These are the people who lost their pensions. These are the people who lost their livelihood. So I do not think we should be so cavalier about these resources.

It's not, however, just our resources. I think it's the resources of the U.S. debtors as well. There's some fuzzy math going on here. I -- it's clear that the U.S. debtors have been monitoring what's going on in Canada, as is appropriate. Absolutely they should. They're -- on their theory of the case they're going to have the same trial again before Your Honor at some point in the future. So they're monitoring it.

Then they're going to have to try it again. Under no circumstances, I would submit, does common sense allow anyone to conclude that monitoring one trial and doing it again is cheaper than just doing it once over.

THE COURT: Well, there is a natural alternative which is that they continue to monitor the trial. They see how it turns out vis-à-vis the other parties and then they resolve it with you all, depending on how it turns out, not

in a trial, but as people usually do in a negotiation.

MR. OXFORD: That is certainly one alternative. But it's by no means guaranteed --

THE COURT: No, it isn't. That's true.

MR. OXFORD: And I think we have the right to press our point not only in Canada against the existing 14 defendants. We have a right to press it against Holdings. And if we can get a good settlement, you know, obviously that would be something we would consider. But --

THE COURT: Well, they would resolve the claim in the context of what already had happened in Canada.

MR. OXFORD: They might resolve the claim.

THE COURT: They might. That's the issue. They wouldn't --

MR. OXFORD: They might.

THE COURT: -- be bound to. And so there is a risk that there would be further adjudication here.

MR. OXFORD: Yeah. There's a very significant risk. I mean, if they're participating in the Canadian court proceedings, they don't have a voice. They don't have any objections to the evidence that comes in. They might totally disagree with it. They might think that Your Honor might make a different evidentiary ruling and that would change the outcome of the case. There's -- you know, there's a lot of maybes and a lot of uncertainties.

THE COURT: The law would be clear, though.

MR. OXFORD: The law may very well be clear. Again, that's -- that assumes that Holdings doesn't take issue with any of those rulings as they apply to them. Again, they're not the before the Court --

THE COURT: It's hard for me to imagine --

MR. OXFORD: -- in Canada.

THE COURT: -- that after a Canadian court had ruled on these issues that I would disagree with it as a matter of -- as an interpretation of the law.

MR. OXFORD: It's a fair point, Your Honor. The law may be more clear after we've been to trial in Canada.

THE COURT: How much of the eight weeks do you think would actually involve Holdings?

MR. OXFORD: I think Holdings would have to be there --

THE COURT: It's in the middle of the whole thing.

MR. OXFORD: -- for the whole part of it that their claim includes joint and several liability claims by the litigation trustee. So I think they have to be there for the whole piece of the trial.

THE COURT: It doesn't sound like it was a controlling shareholder just reading the facts. I mean, if you're talking about a fiduciary, maybe a different concept in Canada, but there is a point where it held that the vast

majority of the stock, but there were subsequent --

MR. OXFORD: Yeah. As I --

THE COURT: -- transactions --

MR. OXFORD: -- understand they were the majority shareholder, Your Honor.

THE COURT: The whole time?

MR. OXFORD: For the relevant period.

THE COURT: During the dividend?

MR. OXFORD: In 2013. Yeah.

THE COURT: Okay. All right. Okay.

All right. Thank you. I appreciate the --

MR. OXFORD: Thank you. Those are my submissions unless the --

THE COURT: Okay.

MR. OXFORD: -- Court has questions. Thank you.

MS. MARCUS: Good morning, Your Honor. Again --

THE COURT: Good morning.

MS. MARCUS: -- Jacqueline Marcus on behalf of the debtors.

Rather than belabor everything, all the arguments that we made in our objection, Your Honor, which essentially boil down to the fact that we don't believe the Canadian plaintiffs have established that the SONOX factors justify the relief requested.

I just want to respond to a couple of the

statements made by Mr. Daucher and Mr. Oxford.

First, Your Honor, I -- you hit the nail right on the head when you asked your first question which was, couldn't the Canadian plaintiffs have sought to sue Sears Holdings Corporation back in December when they filed their Canadian actions. And of course those actions would have been barred by the automatic stay. But if they thought that Sears Holdings was a critical defendant at that point, they could have filed a motion for relief from the stay back then.

Second, Your Honor, the statements that Sears Holdings has been participating in Canada is really very much of an overstatement. Of course we have Canadian counsel that is monitoring, I'll call it more like watching what's going on in Canada. And, in fact, some of our early discussions were should we do anything or should we just let that proceeding take its path without any participation at all. Obviously, the more prudent course was to make sure that nothing happening there would be prejudicing the defendants.

Third, with respect to the specialized court, we have cited cases which indicate that a court like the Canadian court, I think it's called the Commercial List, is not the kind of specialized court that the SONOX factors elude to. The SONOX factors relate more to courts like the

Patent Court or the Tax Court.

In addition, the fact that a Canadian court has issued a ruling that says that the Commercial List is a specialized court shouldn't really bear any weight in this court for application of the SONOX factors.

THE COURT: But isn't the question that -- I mean, I look at this as fundamentally a situation where unlike my interpretation of applicable Delaware law, for example, I would have to take expert testimony of Canadian law and I think that's a major difference.

MS. MARCUS: We don't disagree with that, Your Honor.

THE COURT: Okay.

MS. MARCUS: But I think your point that you made at the end of the colloquy about the fact that if the Canadian litigation proceeds and then we're back before the Court liquidating the claims we may know the answer on the Canadian law was very well taken and very important to the Court's consideration here.

And in addition, Your Honor, as you well know, liquidation of claims against the debtor is one of the core matters before a bankruptcy court and we think you are the specialized court for determining what claims should be allowed against the debtors.

With respect to --

THE COURT: Well, how is this except maybe worse for the debtors, different than a situation where the recipient of an alleged avoidable transfer is a debtor in say Florida and the transferor is a debtor say in New York? I mean, it has to get liquidated somewhere. They're both bankruptcy estates. The one difference here is that foreign law would apply.

MS. MARCUS: Right. I mean, I don't think it's very different, but I also don't think -- it shouldn't be worse for the debtor than if that were the case of just dueling U.S. bankruptcy cases.

THE COURT: Well, all right. But on the other hand, both courts sort of have core jurisdiction over the matter.

MS. MARCUS: Uh-huh.

THE COURT: And at that point I think you would just look at the impact on the estate where the motion is made. And looking here I -- there's a statement in the brief that the debtors submitted that if the dividend litigation is stayed as against them, their obligation to participate in discovery will be much more limited.

But, I mean, are we -- what is the magnitude we're talking about here in terms of costs? I don't really have a sense of that, as to whether -- particularly, let me add one more fact.

The trial here isn't slated to begin until next February. It's not going to be any earlier than next February.

MS. MARCUS: Uh-huh.

THE COURT: By then it's clear to me that the debtors will have a pretty good idea and/or a -- you know, a liquidation trustee or a litigation trustee of their -- the asset side of their estate and should be able to negotiate, I would think.

MS. MARCUS: Yes, Your Honor. So let me start with that one and then I want --

THE COURT: And --

MS. MARCUS: -- to go back --

THE COURT: And a cost --

MS. MARCUS: -- to the --

THE COURT: -- of the trial seems to be the big cost here, not the prep work.

MS. MARCUS: Well, I think the cost of everything leading up to February and, of course, because right now we don't know what the exact recoveries of course are going to be --

THE COURT: Right.

MS. MARCUS: -- hopefully we'll know that by February. But now is when we have to make the determination as to allocation of resources in defending if you were to

grant relief --

THE COURT: Right.

MS. MARCUS: -- from the stay.

And so the point was made about, I think Mr. Daucher gave the example of the $12 million, an estimated potential recovery for the Canadian debtors of $12 million and the cost -- Canadian maybe -- and the Canadian cost of pursuing a litigation.

THE COURT: Right.

MS. MARCUS: But that's from the Canadian debtors --

THE COURT: No. I --

MS. MARCUS: -- point, not from --

THE COURT: -- I understand.

MS. MARCUS: -- our point.

THE COURT: But I --

MS. MARCUS: Right.

THE COURT: It seems to me -- that's why I'm asking the question. It seems to me that if the debtors would have to -- would -- I would think the debtors would -- I would lift the stay to have the debtors -- even if I didn't lift the stay generally, I would lift the stay so that discovery could be taken of the debtors as to the facts on the transfer.

So at least between that and the point where

you're gearing up for a trial in December and January, the trial being in February, it wouldn't seem to me that there would be a huge amount of money incurred.

I don't know, you tell me, I don't have any sense of that.

MS. MARCUS: I don't either, Your Honor.

THE COURT: Okay.

MS. MARCUS: Unfortunately, Canadian counsel isn't here.

THE COURT: All right.

MS. MARCUS: I did want to go back to when you were talking about the dueling better, you know, which court should hear a case.

THE COURT: Right.

MS. MARCUS: The Canadian plaintiffs have said on numerous occasions that Sears Holdings Corporation is not the principal target of the Canadian litigation, that the principal claims are not against Sears Holdings, they've said it multiple times. And if that's the case when the Court applies the factors and balances the harms, I think it's incumbent upon the Court to think about a fact that they've said that Sears Holdings is not critical to their case and that's something that the Court should take into account.

With respect to the Sonax factors, I did want to

respond with respect to --

THE COURT: That would argue that some time between now and well before February 3rd both parties would have incentive to settle then, right? I would think.

MS. MARCUS: We're always interested in settling.

THE COURT: Okay.

MS. MARCUS: With respect to factor one under the Sonax factors complete resolution of the issues --

THE COURT: Oh, can I interrupt you one more time?

MS. MARCUS: Sure.

THE COURT: If I don't lift the stay, there's not that same incentive, right, because Sears Holdings is just sort of holding out there.

MS. MARCUS: That same incentive right now for us, but certainly either at the conclusion of the Canadian litigation or any time between now and then the debtors would want to avoid the expenses and the lay of litigation of the claims.

THE COURT: Am I right, I should have asked you this question. Sears Holdings is not in our U.S. terms, a necessary party, right? You could have this litigation without Sears Holdings?

MR. DAUCHER: Your Honor, not -- Eric Daucher on behalf of the monitor. Not being an expert in Canadian law, but I would say the litigation is going forward or has been

going forward without our participation.

THE COURT: Okay. And no one's argued it as far as I can see that it's a necessary party.

MR. DAUCHER: I think that's right, Your Honor.

THE COURT: Okay.

MS. MARCUS: Okay. That's a factor one.

THE COURT: Right.

MS. MARCUS: So make a concession, so. We have conceded in our papers and I think it would be foolish for us not to concede that if relief from the stay were granted complete resolution of the issues might be possible, but we note that the Court would be considering, I'll call it, some of the same nucleus of facts in connection with the adversary proceeding.

But in that regard and with respect to the importance of factor one, Judge Bernstein in Breitburn Energy has made some interesting comments about factor one, and if you wouldn't mind, Your Honor, I'd like quote 571 Bankr. Reporter 59 at page 69, where Judge Bernstein said, "If joining a debtor as a defendant in a multi-defendant case meant that judicial economy always mandated stay relief, this factor would subsume the other --"

THE COURT: Right.

MS. MARCUS: "-- Sonax factors in many cases and force a debtor to defend against unsecured claims possibly

in multiple venues."

THE COURT: Clearly.

MS. MARCUS: The other statement that Judge Bernstein made in Breitburn, and in that case he granted relief from the stay with respect to certain claims and rejected relief from the stay, with respect to the assertion of certain tort claims.

He noted as follows, "The movement remains free to pursue its unstayed claims against the non-debtor counterclaim defendants and file a proof of claim in this court, while the debtors avoid the time and expense of participating in a trial involving numerous parties, when the ultimate distribution to the unsecured class may prove that the value of the claim in bankruptcy dollars is not worth the expense to either party of litigating it." And that's at 571 Bankr. Reporter at 69.

THE COURT: Right.

MS. MARCUS: The other statement that was made was that resolution of the claim against Sears Holding is holding up the completion of the Canadian insolvency proceedings. And given that the Canadian plaintiffs have only sought relief to liquidate the claim, not to enforce the claim, I can't imagine how that Canadian proceeding can be wrapped up until we're really done with the Sears case and know what the distribution on that claim would be. So I

don't think that that's a compelling factor.

Let's see if I had anything else. I would also note, Your Honor, that there were a couple of the Sonax factors that weren't mentioned by the Canadian plaintiffs, one of which is a claim covered by insurance. And the answer is that while the individual director defendants are covered by the company's directors' and officers' insurance, the actual entity, Sears Holdings Corporation is not, so the debtors would have to pay the litigation expenses out of pocket, as opposed to being able to look to insurance.

The other factor, factor 11 is whether parties are ready for trial. While trial may be eminent, being scheduled for February, the parties are not ready for trial. This is not a case or I should say with respect to three of these actions, it's not a case where the debtor was a defendant in litigation prior to the commencement of its Chapter 11 case. And the litigation had proceeded up to the point of trial. Many of the cases cited by the Canadian plaintiffs have that fact pattern, that's not the case here.

And with that, Your Honor, we believe that the stay relief should be denied --

THE COURT: Okay.

MS. MARCUS: -- and the Court should determine that the Sonax factors don't justify the relief requested.

THE COURT: I want to make sure I'm not missing

something. I -- there -- counsel for the Canadian plaintiffs are right, there are references in the debtor's objection to the adversary proceeding in front of me, that asserts under U.S. law somewhat similar claims but related to different transactions at different times.

I didn't get the sense that the debtors were concerned about any preclusive effect on that litigation that would stem from their participation in the Canadian litigation, right. That's not an issue?

MS. MARCUS: That's not our argument, Your Honor.

THE COURT: Okay. So that adversary proceeding would just go ahead and separately.

MS. MARCUS: Yes, but the question is, you know, could we spare the court getting embroiled in the nucleus of facts related to whether and to what extent there was, you know, a plan to divert assets from either Sears or from Sears Canada for the benefit of certain shareholders. That general theme exists in both litigations.

THE COURT: But it's really a pretty remote theme. I mean, it's --

MS. MARCUS: They are different claims, Your Honor.

THE COURT: Yeah. I mean, it's not even, you know, like --

MS. MARCUS: The --

THE COURT: -- my sweet, Lord, and one fine day, it's not the same -- it's not even the same tune really.

MS. MARCUS: Yeah, the adversary proceeding concerns a Sears Canada transaction in 2012.

THE COURT: Right.

MS. MARCUS: And the Canadian litigation involves the 2013 dividend.

THE COURT: Okay.

MS. MARCUS: Sears Canada is involved but it's a different transaction.

THE COURT: Right. Does the -- but the 2012, is that a Canadian transaction, Canadian law transaction or U.S. transaction?

MS. MARCUS: I think it was another dividend or recap.

MS. HALL: I thought it was the U.S. law spin-off of the Canadian shares to the shareholders of Sears Holdings, but --

UNIDENTIFIED: It is, so it's U.S. law.

MS. MARCUS: Thank you, Your Honor.

MS. HALL: I think Mr. Qureshi or Ms. Brauner.

THE COURT: Okay.

MS. BRAUNER: Good morning, Your Honor, Sara Brauner, Akin Gump on behalf of the committee.

Just very briefly, we rise to echo the points that

Ms. Marcus made and to highlight only a couple of points that were made in the Canadian plaintiffs reply that we believe are either misguided or disingenuous or belied by the specific facts here.

The first is, and this was said a number of times in the Canadian plaintiff's papers that the debtor's disclosure statement, namely the most recent disclosure statement that was filed conclusively demonstrates that there are material recoveries for unsecured creditors.

Respectfully as Your Honor is aware, and as the debtors are certainly aware, the committee does not necessarily share that view, and has very real concerns that we are looking at administrative insolvency, not just on a deep consolidated basis, but also on a consolidated basis.

So the assumption that there must be recoveries here and therefore there's no issue at this juncture of determining claims unfortunately may be incorrect. And there are a number of contingencies worth hundreds of millions of dollars, both in the debtor's estimate and in ours that could push one way or the other the availability of such recoveries.

Similarly the point that the committee is somehow disingenuous by believing there are potentially recoveries here as a result of the litigation is inaccurate. Just because there may be valuable causes of action that would be

pursued by the trust, by the debtors, by some combination does not in turn mean that there are recoveries for unsecured creditors at each debtor entity or overall.

The next point, there's a lot of focus on --

THE COURT: Can I -- Holdings is Holdings, it's above everything.

MS. BRAUNER: Holdings is Holdings, that's right.

THE COURT: Okay.

MS. BRAUNER: The second point that permeates a lot of these pleadings is back and forth on judicial economy and is it more convenient as the Canadian plaintiffs say to have one trial instead of two. And Ms. Marcus touched on this, there is no circumstance under which there will be one trial, uncertain of the underlying facts here. The real question is will Holdings have to defend in two jurisdictions.

THE COURT: That's what I don't -- that was the question I asked Ms. Marcus. I'm having a hard time seeing that. Why would there be --

MS. BRAUNER: So it's --

THE COURT: -- the same issues, why would there be -- put it differently, why would there be -- why wouldn't there -- why would that happen, I don't understand. Is it different transactions?

MS. BRAUNER: Your Honor is correct and Canadian

plaintiffs are correct that they are different causes of action, primarily by way of the fact that we're dealing with different laws. The transactions certainly are not the same transactions. I think it does come down to, in some respects, the theory of the cases.

You have a course of conduct of similar players, you have as Ms. Marcus eluded to perhaps an argument of asset stripping that pervaded a number of years and numerous transactions. And so while yes, there are certainly distinct fact patterns and distinct transactions here, the real question is, how convenient on balance or inconvenient is it to resolve the Sears Holdings issues in connection with a trial that necessarily regardless of what happens in Canada will be proceeding in the U.S.

And the relative harm, balance, however you want to frame it to Sears Holdings having the ability to litigate the limited and probably removable from the remainder of the Canadian action claims, in connection with similar discoveries, similar facts before Your Honor or a U.S. Court.

That's not to say the legal issues are the same and we agree with Ms. Marcus that Your Honor is correct, there will be a need for Canadian law declarations here of some sort, to the extent this Court addresses Canadian law issues.

But I think the point that Your Honor made about perhaps keeping Sears Holdings out of the Canadian litigation, allowing the litigation to proceed and reassessing at a time when perhaps there is a lot more clarity on number of issues that could be gating items here perhaps makes some sense --

THE COURT: Although the issue is we don't --

MS. BRAUNER: -- and potential to dual litigation.

THE COURT: The problem is we don't have any assurance that that would happen.

MS. BRAUNER: That's correct. But I think --

THE COURT: You know, just as a matter of trial strategy I'm not sure you'd want to be on offense or defense in the same trial.

MS. BRAUNER: Do you want to be on offense and defense in two different jurisdictions on the same issue? I mean it's --

THE COURT: Maybe so. Maybe so actually.

MS. BRAUNER: I mean I think the question really comes down to when you look at the parties in the United States, you look at the debtors whose financial position is, you know, challenging at best, and you look at understandably a financial position of parties in Canada that perhaps does not fare much better, you're going to have two trials.

The question is, in how many different places does Holdings, and frankly, do Holdings creditors have to litigate. And that's something that I think might be a little bit lost. To the extent that there are actions proceeding in the United States whether they're commenced by the debtors or a liquidating trust or some other party in interest, there's a real opportunity for unsecured creditors to participate in things that will directly impact creditor recoveries.

And as Your Honor is aware, the committee and unsecured creditors have strong views about the course of conduct and the governance that took place prior to the petition date, and basically precluding that participation by conducting this in Canada for costs and other --

THE COURT: But again --

MS. BRAUNER: -- efficiency reasons is tricky.

THE COURT: -- you're on defense --

MS. BRAUNER: You are.

THE COURT: -- and it's different law and different procedures.

MS. BRAUNER: That's right. But in order for the creditors to participate separately from the debtors which may be something that ultimately the creditors need to do, it would be yet another set of counsel to get up to speed and to participate in presumably not so much discovery but

in preparation for trial and participation in trial.

So it's just on balance, to the extent there is an easy way to resolve or at least a convenient way to resolve some of these issues here, we just believe it should be a consideration.

THE COURT: Okay.

MS. BRAUNER: Thank you, Your Honor.

THE COURT: All right. Thanks.

Okay. Anything else?

MR. OXFORD: Your Honor, if I may just address a couple of few points for the record. Neil Oxford, Hughes Hubbard Reed for the litigation trustee.

Just picking up on Ms. Brauner's point, I confess I'm a little confused about participation of the creditor's committee in the Canadian litigation. As I understand the plan, the committee is going to dissolved in a couple of months anyway, so I don't think --

THE COURT: Well, a representative of creditors. Just like the -- I mean, we don't have the monitor, but you have a litigation trustee, for example.

MR. OXFORD: Who may be able to --

THE COURT: One of the plaintiffs is a litigation trustee in Canada.

MR. OXFORD: Perhaps in consultation with the debtor, Your Honor, I take the Court's point.

Two quick points, we're happy to talk settlement any time, any day. I think the universal rule applies in Canada just as it does here, nothing focuses parties' mind on settlement like a trial date. So we would respectfully say yes to that, lifting the stay would be the best way to focus the mind to get involved in the litigation, and it also captures the proficiencies that we discussed earlier with Your Honor.

If there's a partial lift of the stay just to allow discovery, I'm -- then ultimately there is no settlement, which we would all obviously hope there is, then all of those efficiencies are lost, my horses left the barn and is galloping around the field, and that opportunity is for cost savings that has been lost.

THE COURT: Okay.

MR. OXFORD: And just one last thought. If -- and I'm not suggesting Your Honor should have any concerns about the conduct of the case in Canada, Your Honor may consider if it's appropriate to have a discussion with Justice McKewen (ph) who is the case management judge up there. I raise it only for the Court's consideration.

THE COURT: For litigation of this kind do you know what professionals normally charge per hour in Canada?

UNIDENTIFIED: We're consulting with one Canadian lawyer in the court, Your Honor.

MR. DAUCHER: Your Honor, I'm informed that the rate would typically at the higher end be between 750 and 1,000 Canadian per hour --

THE COURT: Okay.

MR. DAUCHER: -- so 70 percent of that and change for U.S. purposes.

THE COURT: Okay. All right. I have before me a motion by the plaintiffs in four pending litigations that are all being administered by one judge in the Canadian commercial court in connection with the CCAA case of Sears Canada for relief from the automatic stay, so that a debtor in this case, Sears Holdings Corporation, can be joined as a defendant in three of those pending litigations and that litigation can proceed against it in the fourth which was a prepetition litigation where Sears Holdings had already been named as a defendant.

Normally the automatic stay remains in place in Chapter 11 cases with respect to unsecured claims, which is what these unliquidated claims are, as would be asserted against Sears Holdings in Canada.

However, Section 362(d)(1) of the Bankruptcy Code provides in part that upon request of a party in interest and after notice of a hearing, the Court shall grant relief from the stay quote for cause. Cause is not defined in the Code itself, but the 2nd Circuit has laid out various

factors that a Court should consider when being asked to lift the stay to permit an unsecured claim to be liquidated in another forum.

See In Re Sonax Industries, Inc., 907 F2d 1280, 1286, 2nd Circuit 1990, "One, where the relief would result in partial or complete issue resolution; two, lack of connection with or interference with the bankruptcy case; three, whether the other proceeding involves the debtor as a fiduciary; four, whether a specialized tribunal with necessary expertise has been established to hear the cause of action; five, whether the debtor's insurer has assumed full defense responsibility; six, where the action primarily involves third parties; seven, whether litigation in another forum would prejudice interest of other creditors; eight, whether a judgment arising from the action is subject to equitable subordination; nine, whether the movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; ten, the interest of judicial economy and expeditious and economical resolution of litigation; eleven, whether parties are ready for trial in the other proceeding; and twelve, the impact of the stay on parties and the balance of the harms."

As with many multi-factor tests, one needn't apply all of the factors, some of which will never -- will not be present as is the case here. And as a practical matter many

of these factors all focus on the same set of issues, which for purposes of this motion really come down to the impact of lifting the stay on the debtor's estate and the conduct of this Chapter 11 case and the effect of not lifting the stay on the movants.

To my mind questions of judicial economy, partial or complete resolution, and the like is a subset of those types of issues because the administration of a bankruptcy case is all about efficiency and resolving matters fairly, but expeditiously and efficiently.

Having heard the parties and also reviewed their lengthy and informative briefing, which includes also a concession or agreement by the Canadian plaintiffs that they will waive any claim for punitive or exemplary damages, thus obviating the need for this Court to review those types of damages, if in fact, awarded and to consider whether they should be subordinated or not.

I conclude that the stay should be lifted to permit the claim or claims to be liquidated in the Canadian proceeding. I say that primarily because I believe that these claims although also asserted in this case in light of the bar date established by the Court are primarily and in fact I believe wholly Canadian law claims, and ultimately of far greater importance to Canada than the U.S.

They involve issues of the corporate governance of

Canadian companies and transfers that may or may not be avoidable under Canadian law. It appears clear to me and is acknowledged by one of the plaintiffs that such claims at this time at least are uncertain under Canadian law or that, in other words, at least in some respects, the Canadian court would be acting on a relatively blank slate in deciding such issues.

Given that fact, I believe that I would appropriately decline to adjudicate such a claim if there is a parallel proceeding that also would not unduly disrupt or impair the case before me.

See generally the discussion in In Re Picard, 917 F3d 85, 2nd Circuit 2019 at 103. There, of course, the 2nd Circuit determined that to the contrary the claims at issue were in fact centered under U.S. law, but the Court's thoughtful analysis of how U.S. courts should approach issues that are fundamentally governed by and the primary importance to a foreign country gives me guidance here.

I further conclude that lifting the stay would not unduly affect the conduct in an adverse way of this Chapter 11 case. The Canadian court has already laid out I think more than a tentative schedule for the litigation which contemplates the completion of document discovery at the end of June, the completion of examinations, which are not exactly like our depositions but close enough in September

of this year, and a trial in early February.

It's clear to me that the debtors would be at a minimum monitoring that process. Further, the debtors seem to acknowledge in their objection that they also might properly be subject to discovery in that process, even if not named as a defendant.

Clearly, the costs of participating at that level as opposed to a named defendant would be less for the debtors, but I believe that one way or another, these claims do need to be liquidated. And the costs of liquidating such claims if one went to trial would be at least as high I believe here, if not higher.

It also appears to me that the opportunities to reach a settlement of these claims, taking into account not only the claims merits, but also the cost of litigation and the ultimate likely cents on the dollar recovery of any liquidated damages result are far from precluded, and in fact, will be as likely if I lift the stay as if I do not.

It appears to me that most of the costs would take place fairly soon before and during the trial which is projected to be for several weeks. At that point, discovery will have been complete and the plaintiffs all but whom are fiduciaries for a bankrupt estates and creditors would have an incentive as would the debtor to negotiate at that point to avoid additional costs.

It also does not appear to me that the conduct of this litigation would have any preclusive effect on the highly important to this case pending adversary proceedings and any further adversary proceedings that are contemplated by estate fiduciaries.

The result obviously I don't believe would be entitled to any preclusive effect and even the application of comity would be tenuous as to those other causes of action since they appear to me to be governed by U.S. law and involve totally different fact patterns.

I appreciate that at this particular time in these cases the debtors are relatively cash poor. And that is a concern because lawyers always want to have assurance that they will be paid. On the other hand, again, it appears to me that the early stages of the litigation here will not be particularly costly to the debtors above the costs that they would be incurring anyway if I did not lift the stay in monitoring the litigation and/or and participating discovery as a non-party to it.

Each one of these types of cases really involves a detailed factual analysis as shown by my colleague Judge Bernstein in not only the Breitburn case cited during oral argument, 571 B.R. 59, Bankr. S.D.N.Y. 2018, but also In Re Sun Edison, Inc., 557 B.R. 303, Bankr. S.D.N.Y. 2016.

In that case, for example, the debtors were highly

focused on developing a plan, selling their assets, et cetera and had a legitimate concern about opening the floodgate for other litigation if a stay was lifted here.

In that case also, the litigant was seeking to pursue litigation that was in many respects the crux of the whole case, which clearly the bankruptcy court wanted to keep a finger on.

In Breitburn, the issues really focused on efficiency and the position of the various or the options on how the various claims could be liquidated. Here, I don't believe that this ruling will open the floodgate, in fact, I have not granted stay relief I believe in any of the other instances where litigants have moved for relief from the stay except where there's a clear light to insurance. And I frankly don't see any reason to deviate from that course at this point.

However, given that this litigation is clearly more important as a matter of Canadian law and while it is not a case where discovery is completed, in fact, it really hasn't started, it is fair to say that a trial will occur in this matter I believe as soon as or faster than the trial would occur in my case on these claims, and will not interfere sufficiently with my case to prevent that from happening or to sever Sears Holdings from the process.

So in light of all of that, I'll grant the motion

as modified in the papers and lift the stay to let the claims be liquidated.

So I'll ask counsel for the movants to submit the order. You don't need to formally settle the order, but you should circulate it to counsel for the committee and the debtors, so that they can make sure it's consistent with my ruling.

MS. PESHKO: Your Honor, for the record, Olga Peshko, Weil Gotshal for the debtors.

THE COURT: Good morning.

MS. PESHKO: As stated earlier in the record, Your Honor, the next item on the agenda is adjourned.

THE COURT: Right.

MS. PESHKO: That's the William Juiris motion for relief from the stay.

So the next item we have is the motion of Liberty Insurance Corporation for relief from the stay. Its counsel is appearing, I can see the floor.

THE COURT: Okay. Is anyone here on the phone for Liberty Insurance?

(No response)

THE COURT: All right. Well, maybe they decided not to speak given one of my remarks during the last hearing with my ruling. Let me just check to make sure they're not on the call in list. I don't believe they are and I think

that's understandable because the motion is really couched as a request to lift the stay so it'd go against insurance.

MS. PESHKO: That's right.

THE COURT: But there isn't any insurance.

MS. PESHKO: No.

THE COURT: As stated by the debtor's objection. So I will deny the motion based on those facts.

MS. PESHKO: Thank you, Your Honor, we'll submit an order.

The next item is the motion of Rosa Melgar for relief from the stay.

THE COURT: Okay. Is anyone here or on the phone for Ms. Melgar?

(No response)

THE COURT: All right. I believe that's understandable as well, this is the same type of motion. The motion was made in the hopes that there would be available insurance to cover this claim. However, as stated in the debtor's objection to the motion, there isn't. That's clear from the attachment to the motion and in light of that, and in light of the status of the litigation in that, that the movant is requesting the stay be lifted to let proceed, I'll deny the motion.

As noted in the two cases I cited in my ruling, the Breitburn and Sun Edison case, it's the rare case where

the stay is lifted to permit litigation to proceed and the facts just don't warrant it here.

MS. PESHKO: Thank you, Your Honor, we'll submit an order.

THE COURT: Okay.

MS. PESHKO: The next motion is a motion of Winters Industry for allowance and payment of administrative expense claims, Your Honor.

THE COURT: Okay.

MR. FAIL: Good morning, Your Honor, Garrett Fail, Weil Gotshal & Manges for the record.

Before we turn to the next item in isolation, the next and final six items on the agenda are all related, Your Honor.

THE COURT: Right.

MR. FAIL: They're agenda items 11 through 16. Your Honor will note that the debtors filed an omnibus objection to all of the motions, that's at Docket No. 3883. There was a lot of paper already, we felt we would consolidate the reply to synthesize the arguments that were made and reduce the burden on the Court.

In the objection we summarized and responded to the various requests. There are essentially three points that were made by various parties. In general, the parties sought the allowance of claims pursuant to 503(b)(1) of the

Bankruptcy Code. They sought in the alternative allowance of claims for the same claims under Section 503(b)(9). These are for prepetition claims. And then they sought payment, one party in one part of the motion, sought payment for postpetition claims.

As the debtors set forth in their objections, none of the parties is entitled to a claim pursuant to Section 503(b)(1) under the 2nd Circuit definition of administrative expense claims.

With respect to the 503(b)(9) requests, the debtors made clear their position that claimants can't use an inappropriate motion practice to cut short the debtors', and all parties in interests' time to reconcile and allow claims or to avoid the automatic stay.

And third, with respect to one part of one movant's motion we explained why a particular payment wasn't made.

Your Honor, the UCC has joined with a qualified joinder the debtors' position agreeing importantly with respect to the 503(b)(1) analysis and with respect to the process for 503(b)(9) claims to be reconciled and allowed.

I assume that the Court has reviewed the pleadings and is familiar with the case law. As the 2nd Circuit has instructed, priority should be narrowly construed because any priority given to one creditor is done to the detriment

of all other creditors.

I'll defer to the Court as to the most efficient means to proceed this morning, but didn't want to have one party go without introducing them altogether. I'm also happy to answer any questions the Court may have of the debtors at this point.

THE COURT: Okay. I have two orders dealing with claim procedures in this case. There's an order dated February 22, 2019, the bar date order which in addition to setting a bar date for claims generally sets it for claims under Section 503(b)(9) of the Code, and sets out a procedure for then dealing with those types of claims.

I also have an order dated March 28, 2019 that lays out claim objection procedures, claims settlement procedures and claims hearing procedures. It's clear to me that the first order applies to 503(b)(9) claims and I don't think anyone's disputing that.

Are the debtors asserting that to the extent a claim is a 503(b)(1) claim, the latter order, the March 28th order should govern?

MR. FAIL: Your Honor, these parties -- instead of speaking in the abstract, with respect to these parties' motions I believe they filed proofs of claim for each of them.

THE COURT: Okay.

MR. FAIL: They've asserted that they were prepetition claims. In those claims, they've asserted in some instances probably 503(b)(9) priority, they're also asking for 503(b)(1) priority for the same facts and circumstances.

THE COURT: Okay.

MR. FAIL: We don't believe that they're 503(b)(1) claims and we don't believe that creditors should add or enhance a priority to get to the head of the line to then reconcile a general unsecured.

THE COURT: Well, maybe I wasn't clear in my question. It sounds like you want me to decide today -- the others, the claimants clearly do -- whether they have asserted a 503(b)(1) claim, and not to channel them into the claims objection and settlement procedures in the March 28th order.

MR. FAIL: Your Honor, that's the debtors' request. We think the law is clear on the --

THE COURT: So you'd like to get the issue done with?

MR. FAIL: To prevent additional motions or requests.

THE COURT: Okay.

MR. FAIL: If Your Honor wants to defer them all, the debtors' position would be that's fine too.

THE COURT: Well, it may not make a lot of sense because there seems to be --

MR. FAIL: Sought some certainty, we thought that was an easier issue.

THE COURT: The one point that I am hesitating over is that outside of a common fact pattern, which is that the transaction was entered into prepetition, I don't think I should be deciding today anything else under 503(b)(1). And there -- I mean, you may contend, for example, that a claim didn't fall under 503(b)(1) for some other reason, other than the fact that it was a prepetition transaction. That's not really believed or dealt with in these claims, I don't think, that are before me today.

MR. FAIL: Right. Your Honor, the debtors' position is that the movant bears the burden to prove his claim. Each of the motions is pending requesting 503(b)(1); we're simply saying those motions should be denied in part with respect to that.

THE COURT: In other words, just to be -- to get down to the nitty gritty --

MR. FAIL: Yeah.

THE COURT: -- I don't think that what I should be doing today is going through particular invoices and saying, oh, yes, this is postpetition, oh, yes, this is prepetition.

MR. FAIL: We agree.

THE COURT: That should be the claims procedures.

MR. FAIL: We agree.

THE COURT: What I should be going through today, I gather both sides want me to do, is to deal with the legal issue that the claimants have raised, which is that as long as goods are received by the debtor postpetition, notwithstanding when the transaction actually occurred or the consideration was provided, they have a postpetition claim.

MR. FAIL: Your Honor used the word "received." The word "received" is open to interpretation --

THE COURT: It's not in the statute.

MR. FAIL: That's our point, Your Honor. And --

THE COURT: It's not 503(b)(1).

MR. FAIL: That's our point.

THE COURT: But that's the only issue that I think is before --

MR. FAIL: So I would say the appearance -- they're saying --

THE COURT: -- me today.

MR. FAIL: I agree, Your Honor, and I think we just heard -- I hope we've heard your answer on that. The appearance of goods in America doesn't determine 503(b)(1) priority where we've taken title, ordered, and incurred an obligation prepetition.

And so the -- you know, a deviation from the clear 2nd Circuit Southern District precedent would add ten to a hundred million dollars of additional claims that the debtors can't afford in these cases.

THE COURT: Okay.

MR. FAIL: I'll cede the podium, Your Honor, but I'm happy to answer any other questions.

THE COURT: Okay.

MR. SCHWARTZ: If I may, Your Honor, Jeffrey Schwartz with Cole Smith on behalf of Winters Limited and to be clear for the record, I've not asked you to look at an invoice today.

THE COURT: Okay.

MR. SCHWARTZ: I had filed this motion on behalf of my client in December. I, at the debtors' request, didn't press to have it heard because of the pending matters. And then a couple of months ago, the debtors told me that they agreed with the amount of the claims to the penny.

THE COURT: I'm sorry?

MR. SCHWARTZ: They agreed to the amount of the claim to the penny, but they were applying as to the administrative claim and obviously there are administrative claims asserted and 503(b)(9) claims that we're asserting. And I just filed the initial reply just to present to the

Court that fundamental question, is the Court applying constructive receipt. I'm talking about 503(b)(1) not 503(b)(9) --

THE COURT: Right, because 503(b)(9) is governed by my February order.

MR. SCHWARTZ: Right. So I'm not putting that before the Court now.

THE COURT: Okay.

MR. SCHWARTZ: The interpretation of 503(b)(1) under applicable Supreme Court and 2nd Circuit law does require harmonization of two sections in the same section, harmonization.

So you have under the 2005 Act, you have Congress acting, Congress amended together in a separate subchapter 546(c) and added 503(b)(9). (b)(9) then -- so Congress has established a policy as to vendor claims.

Congress had determined, and I'm cutting to the chase here, Congress had determined that vendor claims when they're at least interpreted by the 3rd Circuit the actual receipt rule that vendor claims prepetition-based agreements when the goods are delivered actually received by the debtor in 20 days preceding the petition date, those goods are entitled to 503(b)(9) administrative priority.

So then what the debtors have posited to you, and I understand, this estate currently is essentially

administrative insolvent. I understand that they don't have the money to pay these claims, and we're not looking for money today. Winters is not asking you to order these claims to be allowed and paid today. I understand all of that. And I think most of my colleagues do.

THE COURT: Most do, I think there are a couple of requests for immediate payment.

MR. SCHWARTZ: And I winced when I read that because look at the disclosure statement, you'd know that this is one of these --

THE COURT: Right.

MR. SCHWARTZ: -- novel situations where 139 million of 503(b)(9) money is to come from the buyer, as well as 166 million of other payables money, as well as there's 52 million of cash being withheld, cash inventory being withheld by the buyer, and given the fact that the estate has filed a claim for $2 billion accusing the buyer controlling insiders of actual fraud, self-dealing, lack of good faith, as appropriate fiduciary one can't really be saying why that, that that's going to be resolved any time soon, if past is prologue and we see in the disclosure statement that's listed as an asset at face, and I don't know, I haven't talked to any claims buyers, but it's hard to imagine anyone would pay face for that.

So I get the distress --

THE COURT: Okay.

MR. SCHWARTZ: -- the administrative distress and I think my colleagues do, but there's always hope, Your Honor.

So I just want a couple -- for the record, I want to make hyper abundantly clear that when the debtor says six movants impermissibly seek to leap ahead of thousands of other creditors in both priority of payment and priority of the loss of the prepetition claims, that's false, it's just untrue.

I'm just trying to get -- Your Honor referred to fairness early. Your Honor referred to clarity of law earlier on today's docket. And the point is, there are plenty of administrative claimants who were they to have this clarity, I mean, what would my client do if Your Honor determines 503(b)(1) that it's still the constructive receipt rule and then by implication under 503(b)(9) it's constructive receipt rule.

Your Honor said last month that, oh, three to five years out, maybe there will be a couple of cents or three cents, some nominal amount. So are they going to pay legal fees to get these claims, you know, allowed an amount. I already know what the amount is anyway.

The only reason any party, any of the foreign vendors is here is -- including -- I'm here on behalf of my

client is simple. 503(b)(9) as interpreted by the 3rd Circuit is clear, there is an absolute obligation in interpreting the law per the Supreme Court and the 2nd Circuit. And all these cases they've cited are pre-2005.

THE COURT: No, they're not. Listen, I'm going to cut through this.

MR. SCHWARTZ: Yeah.

THE COURT: The 2nd Circuit -- I'm sorry, the 2nd Circuit has not ruled on the proper interpretation of the word "received" in Section 503(b)(9).

MR. SCHWARTZ: Yes, Your Honor.

THE COURT: And right now, as far as the 3rd Circuit is concerned two judges ruled one way, they happen to be trial judges, and the 3rd Circuit ruled the other.

But one thing is clear, they were interpreting a word. The word was "received." That's in the specific provision, 503(b)(9), "received." And the 3rd Circuit's case, World Import was all about what Congress meant when it used that word, the word "received" in 503(b)(9).

MR. SCHWARTZ: Yes, Your Honor.

THE COURT: It assumed, that is the 3rd Circuit assumed, that it was incorporating UCC law as then known as an implied meaning for the word "received," whereas the trial courts said, well, since foreign vendors don't use the UCC, that maybe you should apply the convention on

contracts. And the inco (ph) terms governing it, which are incorporated in it. But it's all geared to interpreting a word in one statutory section, 503(b)(9). That word doesn't appear in 503(b)(1). 503(b)(1) as interpreted by the Circuit and by the district and by others after 2005, has a very different formulation, which says, "after notice and a hearing, there shall be allowed administrative expenses, … including the actual necessary costs and expenses of preserving the estate." And the 2nd Circuit has held that that includes two things; actual and necessary, and estate. So you have to have a transaction with the estate, with the debtor in possession or the trustee. It's a totally different statutory framework.

Now, so I think your argument just comes down to, well, there are illogical results because of how 503(b)(9) is drafted and interpreted by the 3rd Circuit. It's not the first time Congress has done something like that, but they certainly didn't rewrite 503(b)(9) notwithstanding that there was extensive case law interpreting it just as I've said, including against very sympathetic parties, including pension beneficiaries and retirees, where notwithstanding that the pension withdrawal claim occurs, arises post-petition, their claims except for the work they did post-petition are prepetition claims.

It would be totally illogical for me to assume

that Congress somehow rewrote out of the Code all of that case law and intended that provision to somehow now be interpreted to include the word "received" in it, as interpreted by the 3rd Circuit. It just doesn't make any sense.

MR. SCHWARTZ: May I respectfully submit to Your Honor that when the goods are delivered postpetition that's to a debtor in possession --

THE COURT: But the transaction is prepetition. When a --

MR. SCHWARTZ: Performance is postpetition when the goods are received by the debtor in possession.

THE COURT: No, the transaction is a prepetition transaction. There are lots of times when things happen postpetition. Frenville, for example, McFarlands, but the consideration was prepetition, there was a contract prepetition. There was a purchase order prepetition. It couldn't be clearer under the case law.

MR. SCHWARTZ: I'm trying to put out the consideration is provided postpetition to the debtors.

THE COURT: If the goods had not been delivered, the debtors would have had a prepetition lawsuit against the client -- your client.

MR. SCHWARTZ: Right.

THE COURT: That was the transaction, the

contract, the prepetition contract. It was performing -- your client and all the other parties who have made this argument were performing a prepetition agreement. It wasn't an agreement with the estate, it wasn't an agreement with the debtor in possession.

MR. SCHWARTZ: May I respectfully submit the estate accepted the goods.

THE COURT: But based on a prepetition contract.

MR. SCHWARTZ: But they got the goods, they have to receive the consideration.

THE COURT: It doesn't matter. It doesn't --

MR. SCHWARTZ: So the estate said --

THE COURT: Do you have any case that supports this? You don't, right, because you haven't cited any?

MR. SCHWARTZ: Well, the 3rd Circuit decision --

THE COURT: That's under 503(b)(9).

MR. SCHWARTZ: Correct.

THE COURT: Interpreting -- and it's crystal clear that they're trying to deal with a specific word under 503(b)(9), not with policy, just with the matter of statutory construction --

MR. SCHWARTZ: Well --

THE COURT: -- trying to figure out what the word "received" means.

MR. SCHWARTZ: The 3rd Circuit did say it was

dealing with policy that 2-702 of the UCC was incorporated in 546(c) and that in 2005 the Congress enacted an amendment to 546(c) and also enacted 503(b)(9) which did establish a policy as to vendors.

THE COURT: No, they don't say that. In fact, they do not say that, sir. They say, in the context of Section 503(b)(9) -- I'm sorry, the context of Section 503(b)(9) is clear, "It is an exception to the general bankruptcy reclamation scheme established by Section 546(c). Given the interrelationship between these two provisions and our holding that Congress meant for terms used in Section 546(c) to bear the definition used in the Uniform Commercial Code at the time of (indiscernible) enactment. It follows that the UCC definitions also apply to the Section 503(b)(9) exception."

And then they have a footnote that says, "We note we did not in Mirren (ph) --" I'm sorry, "We note as we did in Mirren that our reliance on the UCC in determining the time of receipt does not mean that the definition of receipt under the Bankruptcy Code is a matter of state law and might change were an individual state to alter its laws; rather, Congress intended to use the UCC definition at that time; i.e., when it enacted the statute, physical possession, and it is not subject to change absent an amendment to the Bankruptcy Code."

It's all about 503(b)(9), it's just trying to figure out what Congress meant by using that word. It doesn't have anything to do with 503(b)(1). It's all in the context of 503(b)(9). Nothing about vendors generally.

And again, I'll go back, I guess vendors are important like every other creditor is important, but I doubt Congress views anyone more important than pensioners and retirees. It's enacted special statutes in certain circumstances where they benefit, nevertheless, under the case law even though the liability is crystallized when the plan is terminated, the claim is postpetition only for their postpetition work, that portion of it. The rest is prepetition.

MR. SCHWARTZ: Right. Yes, Your Honor.

THE COURT: They didn't change the law, in other words. They didn't create a special vendor category other than 503(b)(9).

MR. SCHWARTZ: I don't mean to vex Your Honor --

THE COURT: I'm not vexed, I just don't -- it doesn't -- I don't see anything to this. There's no special vendor protection other than 503(b)(9) which is very special, it created a whole new category of administrative expenses, the only administrative expense that's prepetition.

MR. SCHWARTZ: There's a general statutory

construction subsection should be harmonized, basically what you're sanctioning here is that if Sears or KMart or any one of the debtors had decided as New Co would, Transform, whatever it's called now, they've sent out a letter to get around 503(b)(9) for whatever Chapter 11 or whatever other purpose they have, dealing with bills of lading so that they establish an agent and so forth.

So the idea here is that if Sears had 19 days before the petition date, said, okay, we're going to take half of the common carrier's delivering goods, and we're told, come back on October 16th that that would be then those would just be general unsecured claims.

THE COURT: Yeah. I mean, that's -- Congress drafted this exception, and it is an exception. And there are ways around it. I doubt they really thought through all the ways around it; in fact, I'm pretty sure they didn't. And probably the people that were trying to get this in said to themselves, we better get as good as we can get.

MR. SCHWARTZ: For the record, when there's a position that it's an anomalous result I would assume plausible result, it could never be imputed to Congress, just stating it for the record.

THE COURT: Well, okay. But I will respond that special purpose legislation often has this effect. It does create anomalous results, but it's special purpose

legislation, it itself is anomalous, it doesn't mean that the whole rest of the structure of the Bankruptcy Code has to be turned on its axis to accommodate it. It's a special purpose exception, it doesn't go beyond that.

MR. SCHWARTZ: Thank you, Your Honor.

THE COURT: Okay. Thank you.

MR. GALARDI: Your Honor, for the record, Greg Galardi of Ropes and Gray on behalf of Apex.

I've heard Your Honor and I'm not going to try to vex you. What I'm really going to do is -- and I understand that when Congress does special legislation it has anomalous results. We did argue and we believe there is a 503(b)(1) basis based on 2nd Circuit law.

And I want to point to Your Honor cases we did cite, and a case that actually does support the proposition from the 9th Circuit with respect to 503(b)(1).

First, Your Honor, if you go to Chattooga 296 B.R. at 656, though the court didn't conclude that there was a claim and instead had an evidentiary hearing, it specifically took on Verizon and it says, "The Court can nevertheless find that ACC used the service in question that it wanted them and it needed them and it did so post-petition knowingly and willingly.

You have Judge Bernstein's decision that's cited in that case, Patient Education Media, that also looked to

whether the postpetition conduct induced the performance postpetition.

THE COURT: But Patient Education Media was the sound stage case, where they just left the sound stage there and they used it.

MR. GALARDI: I understand, Your Honor. But here we have the following difference. First, in the cases that they were cited, Your Honor could look at the 9th Circuit case, Coastal Trading case, 744 F.2d 686 where the 9th Circuit actually said that UCC acceptance that occurred after the petition date constituted an event and a transaction that could give rise to the 503(b)(1) claim.

So that -- you may not agree with that case --

THE COURT: Well, the 2nd Circuit doesn't agree with it, it's the --

MR. GALARDI: The 2nd Circuit hasn't ruled on exactly that point, Your Honor.

THE COURT: But it's the -- if you have a prepetition transaction it's not with the "estate."

MR. GALARDI: Your Honor, what you said is a prepetition transaction and I hate to say this, but you put the rabbit in the hat. Because what Chattooga says, which is again, 296 B.R. 656, it's not whether you had a contract or transaction, but it is to go beyond that and to say, what would a postpetition event and could they constitute a

transaction not in the sense of the contract. That is significant. The underlying theory is to encourage vendors to deal with the postpetition estate, going on achieving those goals requires satisfying the legitimate expectations of those who supply postpetition goods and services. For those reasons, it is circumstances surrounding the postpetition delivery and receipt of goods, rather than either the presence or absence of a contract for the delivery of contractual privity that is determinative. That's what we have argued.

THE COURT: How are they being induced?

MR. GALARDI: Your Honor, there's a first day order that Your Honor I came before you and you said --

THE COURT: The first day order is a separate issue.

MR. GALARDI: No.

THE COURT: But you argue the pre- and post point, that's really -- they have to deliver.

MR. GALARDI: Actually you don't have to deliver, Your Honor.

THE COURT: They have the -- and otherwise, they have a reclamation order.

MR. GALARDI: No, they also have a right to stop shipment when the goods haven't had the title passed. Those are two valuable legal rights the vendors gave up.

The debtor instead says, we don't want to go through that disruption, we don't want to go through that litigation, we don't need thousands, and on the other side, where you have the thousands of lift-stays, we want to resolve this and we're going to say if you ship or deliver postpetition you'll be paid in the ordinary course of business.

THE COURT: Okay. That's the November 20th order.

MR. GALARDI: That's the November 20th order, it's also when I came -- no, actually I think it's -- Your Honor, I came back on the shipping, we qualified it, it was the second day, yes, November 20th.

THE COURT: Right.

MR. GALARDI: We had this discussion in the transcript --

THE COURT: That order I didn't think we were going to be dealing with today. That needs to be dealt with in a separate context.

MR. GALARDI: Well, but, Your Honor, that exactly is the context because our position is, with that order, with us coming in and saying exactly what we said, Your Honor said --

THE COURT: Well, I'm sorry, Mr. Galardi, the main thrust of -- maybe everyone else's of your colleagues, on your side of the table this time was not really based on

that. It's based on this theory that receipt has somehow been elevated now into delivery.

I appreciate the issues raised by the November 20th order. There are two conflicting paragraphs in that order, for example. The debtors assert that there were discussions back and forth on the record; that's really not in front of me today. I'm going to deal with that another day.

MR. GALARDI: But, Your Honor, here's the issue. You're being asked to rule today. And maybe I am excluded from this, but you're being asked to rule today that there was no, and I want to understand a final order, there is no 503(b)(1) for any vendor who delivered. What I am suggesting --

THE COURT: I'm not saying that.

MR. GALARDI: Okay.

THE COURT: What I'm saying is, there is no 503(b)(1) based on a theory that if you -- separate and apart from this order, separate and apart from the November 20th order -- on the theory that you are entitled to an administrative claim because you delivered postpetition as a matter of law.

MR. GALARDI: That somehow receipt, so somehow there has to be consistency, I understanding that, and that's why we said we're not going to fight it, and it's 3rd

Circuit and everything else.

THE COURT: But the separate issue, the effect of the order, that's for another day. To me, that's a more complicated issue and, you know, I had like seven of these, I think you might have been the only one that raised that point, and I'd rather deal with that separately.

MR. GALARDI: And I think -- so then we would ask if Your Honor just to move forward with that at some point in the not too distant future because I did --

THE COURT: That's fine.

MR. GALARDI: -- raise it back in November ---

THE COURT: That's fine.

MR. GALARDI: -- and our motion has been pending.

THE COURT: But there are a lot of other issues related to that, like --

MR. GALARDI: Understood.

THE COURT: -- what were the discussions, who did what, that's the type of thing that I think people should be talking about.

MR. GALARDI: Your Honor --

THE COURT: You know, the Indian company, Pearl, says we were told X, Y and Z. I don't know if that's true or not; I think it depends, because the order itself is just a starting point. The order has two conflicting provisions. So it may be a case-by-case determination.

MR. GALARDI: Your Honor, again as we've said in our papers and I'll leave it for another day, we actually don't think when you make a public statement of the sort, and I'm not sure what two inconsistent remarks you're saying --

THE COURT: Well, I'll read them. Paragraph 8 says, "All undisputed obligations of the debtors arising from the postpetition delivery or shipment," so it has the word "delivery," there's a typo, "by, of goods under the Prepetition Orders, are granted administrative expense priority status pursuant to Section 503(b)(1)(A) of the Bankruptcy Code."

And then it goes on to say, "and the Debtors are authorized, but not directed to pay such obligations in the ordinary course of business, consistent with the parties' customary practices in effect prior to the commencement date."

Now, "Prepetition Orders" itself, that term isn't defined in this order.

MR. GALARDI: Correct.

THE COURT: Second, though, paragraph 12 says, "Notwithstanding entry of this order, nothing herein shall create, nor is intended to create any rights in favor of or enhance the status of any claim held by any party."

MR. GALARDI: Your Honor, I guess we'll have the

dispute later, but if the debtor is going to take the position a reservation of rights, when you have that specific undefined.

THE COURT: They have taken the position.

MR. GALARDI: I understand, but it's your order, Your Honor, that's why I was here in November to ask for exactly that clarification, knowing exactly that this would be the debtors' change of position, and that's why we think judicial estoppel applies --

THE COURT: Well --

MR. GALARDI: -- and we don't need an evidentiary hearing on this.

THE COURT: Well, I would need to go through the transcript of that hearing. But in addition to that, I think that there may be issues with individual creditors. I don't know what they were actually told. I don't know if they were told, oh, forget about that order, for example, or forget about paragraph 12, so.

MR. GALARDI: Yes, Your Honor, I mean, I guess we'll do that but then we're going to be having, for example, my client probably has $7 million in administrative claims, whether they're 503(b)(1) or (9) this will come up again in the not too distant future --

THE COURT: Well, perhaps but they'll -- it's not a blanket ruling in other words.

MR. GALARDI: It should be a blanket rule, Your Honor, with all due respect when a debtor publishes an order to all of the vendors an intention to give them, and Your Honor and I have practiced where it's out of an abundance of caution, to give them an order so we can shove it -- give it to the vendors and let it --

THE COURT: It's a five page order, it's not that hard to read.

MR. GALARDI: Exactly and it's not that hard to convince shippers and vendors to ship based on that order, which is exactly what the practice the debtors do.

THE COURT: Well, I don't know.

MR. GALARDI: Okay.

THE COURT: I mean, it depends, I think. Some vendors might be delighted to ship because they're going to get paid at least for what they have in their inventory.

MR. GALARDI: That's fine, Your Honor, we'll --

THE COURT: And then they keep doing it, and they get a new order, the Indian company for example, got an order that three times as large as what they shipped.

MR. GALARDI: Yes, Your Honor.

THE COURT: Really, I mean, I think at that point people should be going through the claims resolution process --

MR. GALARDI: But this is --

THE COURT: -- and this is a point to raise as part of that process.

MR. GALARDI: Well, but the claims resolution process is addressed to prepetition claims.

THE COURT: Well --

MR. GALARDI: This goes to administrative claims. It's not a 503(b)(1), this goes directly to what should have been paid in the ordinary course.

THE COURT: But I don't think it's a case where you can do it as it's teed up before me today. I don't have any witnesses. I think you would want to talk to the debtors first about it -- you say you have either 503(b)(9) or 503(b)(1) you want to liquidate -- and decide which is which and see what your area is. I mean it's --

MR. GALARDI: Well, Your Honor, I think we'd be prepared to put up witnesses at the next hearing very rapidly on the (b)(1). It's not a simple overlap issue. There is no dispute over the --

THE COURT: Well, there may not be, there may not be, but at least normally people try to quantify what they're fighting over in bankruptcy and --

MR. GALARDI: Our first motion did, it said $5.4 million in 503(b)(1) and $1.7 million; this issue has been out there. We were prepared again, Your Honor had the sale hearing, you had all these hearings --

THE COURT: Right.

MR. GALARDI: -- we're prepared to come back in very short order and put on evidence with respect to the claims.

THE COURT: Okay. That's fine.

MR. FAIL: Your Honor --

THE COURT: I just suggest that maybe you go through it with the debtors first.

MR. GALARDI: We have tried.

THE COURT: Okay. All right. And are these potential claims that Transform's picking up?

MR. GALARDI: No.

THE COURT: No, they're not, okay.

MR. FAIL: Your Honor, just so they don't pile up, I'll just add a couple of rebuttal points.

First in terms of the process, the debtors don't believe that admin claimants can properly file motions and appear at their discretion on 14 days' notice. If people aren't paid there's contested matters that need to be commenced, but the debtors aren't inviting that, the debtors will work and review issues.

Mr. Galardi and his clients, all of these parties and movants, and understand the complexity of the issue, and the way that they've interrelated 503(b)(1) to 503(b)(9) we sought to provide them the clarity for 503(b)(1), and I

think Your Honor's ruling today has gone very far to that end.

With respect to the allegation that the final order could have influenced any party, but that point in time I believe the allegations in the -- in Apex's motion were that the goods were delivered, so I mean the parties --

THE COURT: But those were the factual issues that --

MR. FAIL: -- before they move going -- I agree --

THE COURT: -- depend on each vendor.

MR. FAIL: -- factual issues, I'm just saying the parties should be cautioned about making statements about reliance that occurred after the fact. Our position on that has been very clear from the very first minute it was raised. Any party that would have asked us would have been directed to the paragraph that said you're not going to get an increased priority.

There was reference to the Chattooga case, but the citation that was given referred -- it was familiar, because I read all the 50 cases that were cited last night; again, it was the Adelphia Business Solutions case. And the issue in that case that was being determined had nothing to do with delivery or shipment. It had to do with two different debtors and Verizon saying one of them owed me money, and there were defenses, one saying was the other, it was a

contract with the other, has nothing to do with this whatsoever. Whatsoever.

And then there was also reference to the Coastal Trading case, which other courts have distinguished and said isn't binding and isn't definitive.

So for another day, for another time for 503(b)(9), but I don't want to leave the record mistaken that the debtors accept any of the statements that were made.

THE COURT: Okay.

MS. BENCZE: I've sort of been going out of turn, Your Honor. Nola Bencze with Clark Hill, and I represent Milton Manufacturing.

I heard you loud and clear, Your Honor. We reserve any rights as to our 503(b)(9), and that obviously will be decided in accordance with your Judge's order.

I've heard the arguments. In our papers we did point to that order, the November 20th order as part of the inducement. The use of the term of "inducement," actually, Your Honor, is coming from the Adelphia Business Solutions case which debtors' counsel just mentioned, as well as Jartran, and perhaps Jartran is a case you may recall because it dealt with the Yellow Pages, a prepetition contract.

And the Yellow Page vendor, you know, ran the ads

postpetition and it turned out the debtors didn't want them, and said we never wanted them. And the significance about that, Your Honor, is that the transaction with the debtor in possession is satisfied by either inducement to do the postpetition transaction, or where the benefit is knowingly accepted, and I'm quoting Adelphia Business Solutions, as well as Jartran.

I think that's significant here because the debtor surely accepted the goods when it arrived at its facilities, sold them, and used them to carry on whatever was necessary to operate the Chapter 11.

THE COURT: The debtor borrowed money that it had in its bank account prepetition that it used postpetition. Your logic would suggest that is also an administrative expense.

MS. BENCZE: Well, I don't know that I would agree with you on that, because the borrowed money is in their bank account based on a whole set of different relationships.

THE COURT: But it used it postpetition, so it can't be the post-petition use.

MS. BENCZE: No, it's not the postpetition use, Your Honor, perhaps I misexplained that. It's the fact that it was welcomed and wanted.

THE COURT: I'm sure they wanted the money too.

MS. BENCZE: I do, Your Honor, I see what you're asking me, I really don't agree with the analogy.

THE COURT: Okay.

MS. BENCZE: Because to me the money in the bank account, maybe at this point, my life (indiscernible) so, you know, how that money got there and so on and so forth, but I don't see it, so I apologize.

But that's the cases we were relying on, they were not -- I mean, I definitely see the end world in Ports (ph) case, but that was not what we relied upon. We were relying upon what had been previously held in the 2nd Circuit.

So I wanted to bring that to your attention.

THE COURT: Okay.

MS. BENCZE: And I guess ask a question, Your Honor. What -- I hear our discussion here, I hear you feel there needs to be another day in regard to determination as to the November 20th motion.

THE COURT: Order.

MS. BENCZE: I'm sorry, order.

THE COURT: Right.

MS. BENCZE: What is happening today with the 503(b)(1)? I mean, what are -- is this being put off for another day?

THE COURT: Well, I mean, no one -- I don't know what you're expecting. Every vendor as far as its reliance

on this order is different. So clearly I wasn't going to decide that today. I did have this one legal issue which was posited to me, which is simply based upon when a debtor actually gets physical possession of goods decides whether it's a pre- or postpetition claim and I'm happy to have ruled on that, because I think that's just not correct as a matter of law.

Other than that, I don't know what -- you know, it's just not -- it's not teed up properly before me at this point.

MS. BENCZE: Well, we have other counsel, Your Honor, thank you, Your Honor.

MR. FAIL: Your Honor, just on the process point, the debtors haven't objected to the claim so if the debtors will review the claim --

THE COURT: I mean they're filed administrative claims.

MR. FAIL: If they were, they were; if they weren't, a motion doesn't give it an ability to file or an amendment to a claim, but we'll review them. Although Milton did not make the argument for Alliance, I'm not sure why it's being brought up if it was supposed to be today.

THE COURT: Okay.

MR. FAIL: Milton raised that point; there are 2,000 claims asserting 503(b)(9) that we're processing.

We'll evaluate and we'll object or we'll allow or we'll negotiate in due course.

THE COURT: Well, these are not -- I mean, the 503(b)(9)'s will be dealt with separately. There's, no one's here pushing the 503(b)(9) claim today. It's the 503(b)(1) claims. They do -- I mean, there's no administrative expense bar date.

MR. FAIL: Right, so there were two -- there were only two parties, Pearl and Apex that were asserting it, and we could figure out if we need to schedule a hearing --

THE COURT: Right.

MR. FAIL: -- or agree to wait and see.

THE COURT: And you're --

MR. FAIL: It may be moot if we agree that they have a 503(b)(9) in certain circumstances.

THE COURT: Well, I think Apex says it's not moot because there's a difference, like one's 5 and one's 2 million.

You're Pearl, right?

MR. WANDER: Well, I'm David Wander.

THE COURT: Well, I know, but you're representing Pearl, I'm sorry.

MR. WANDER: Yes, Your Honor, David Wander of Davidoff Hutcher & Citron, counsel for Pearl Global Industries. I will be very brief, Your Honor.

THE COURT: Okay.

MR. WANDER: First, I want the record to be clear, whatever we put in our motion, the relief we were seeking, we're not -- we did not come to court today to ask Your Honor for a ruling to pay our client, even if you ruled in our favor on the legal issue.

THE COURT: Right.

MR. WANDER: The time to go over the invoices is for another day.

THE COURT: Okay.

MR. WANDER: I put in my reply, I only disagree with Your Honor on one item so to speak, which is I do believe that in order for the case to move forward and confirmation of the plan that has been filed and amended that there needs to be a ruling on both the 503(b)(9) issue and World Imports and "receive," that issue, as well as the 503(b)(1). I recognize that that's not going to happen today, but that's what we had said we needed today.

THE COURT: Well, clearly I will at a minimum have to estimate the allowed administrative expenses for confirmation purposes.

MR. WANDER: Correct, correct. So we did make the inducement claim; we're the Indian company that Your Honor referred to.

THE COURT: Right.

MR. WANDER: And I'm going to be very brief because I do agree that this is not for today. I just want to be clear that my client's inducement claim is not based on the order of the Court. Okay. And I wasn't representing my client at that time, I don't believe they had counsel.

My client's inducement claim is based on the e-mail that was sent to my client and all the foreign buyers and I just want that to be understood, and I believe that may be a difference in our papers, but not necessarily a difference in the positions of the claimants because that e-mail was addressed to I believe all foreign vendors.

So I just want that to be -- the record to be clear as we go forward with the discovery, in discovery or whatever procedure they propose, that our reliance was based on the e-mail that was sent to our client, and we believe the other foreign vendors.

I do believe we should have some order on the 503(b)(1) issue, just as a matter of the record, but as far as our motion I'll continue with the debtors' counsel with regard to the inducement claim and wait for the 503(b)(9) to be teed up whenever Your Honor does it.

THE COURT: Okay. I mean, I think -- I mean, obviously the debtors have filed a plan, you're in plan discussions, contemplating a confirmation hearing. You should give some thought with the Committee on how to deal

with these issues in sort of a global context as part of confirmation.

MR. FAIL: Thank you, Your Honor, we will and we're looking at the claims as they were asserted, parties asserted claims in ways that are favorable and we're going to address those that were asserted, not hypotheticals. Obviously Mr. Wander referred to a record, I assume, and the Court should only take that to mean his statement. There are no facts in evidence with respect to any correspondence.

THE COURT: Absolutely. But people should be turning to facts, I mean, it takes two for example, not just one party.

MR. SARACHEK: Your Honor, Joe Sarachek on behalf of Mien. Really two points and I won't repeat, and we are all talking the 503(b)(9) creditors and, you know, with respect to Mien in particular, just so it's clear, the order of Mien and it's a small order, but it had -- it reverberates throughout like China I'd say, and I have a bunch of Chinese clients, their order was prepetition. The goods were delivered postpetition, they were at the freight forwarder. The freight forwarder was not going to release those goods to Sears absent, my understanding is, receiving your November 20th order.

Sears subsequently recognized that the goods came postpetition, and they, Sears, believed that they were only

obligated to pay Mien postpetition some time in February. They at one point said, we're going to pay you and then they got into this whole --

MR. FAIL: Your Honor, I'm going to --

MR. SARACHEK: Wait, wait one second. Well, the point is, Sears acknowledged that they did not have receipt of the goods. And Sears, in fact, said, oh, no, this is ESL's obligation, Your Honor.

THE COURT: Look, it's -- I know you're an officer of the court but this isn't evidence.

MR. SARACHEK: Well, it's in an affidavit, Your Honor.

THE COURT: Well, but it's still not evidence. I don't have that person here.

MR. SARACHEK: I understand. I want -- I need to emphasize to the Court that --

THE COURT: And they'd be happy to have ESL pay for it, that doesn't mean that they accept that it's a post-petition claim, they're happy to have ESL pay for it. I don't think that matters.

MR. SARACHEK: Your Honor, I need to emphasize to the Court --

THE COURT: I'm happy to have ESL pay for it, too, I mean, you know.

MR. SARACHEK: Well, so would we and June 1st

according to the Court's previous order they're obligated to pay $139 million --

THE COURT: Right.

MR. SARACHEK: -- and candidly we have been reaching out to Weil throughout this process. We have not gotten any satisfaction of assurance of payment, and quite frankly we're really quite all of us uncertain where the claims resolution process is. And the reverberations are that many of our clients are facing insolvency themselves. And that's a real fact.

So if they're not paid, whether it's on the small amount or on the larger amount, there are consequences, Your Honor.

THE COURT: Okay.

MR. SARACHEK: And we're not getting any satisfaction from dealing with debtors' counsel because we're not getting any clarity, notwithstanding and you've referred to that you have these two orders on 503(b)(9); well, we've called them umpteen times to discuss resolution and some certainty, and we have no certainty.

And so, you know, cutting through all the red tape, we're all here because we do need certainty on behalf of our clients. We weren't expecting you to order that they pay us today, but we do need some certainty.

THE COURT: Okay.

MR. SARACHEK: Thank you.

THE COURT: Okay.

MS. WEYAND: Thank you, Your Honor, Jacqueline Weyand from Buchanan Ingersoll and Rooney, on behalf of Gokoldas.

I think the arguments have been set forth by my colleagues here today. The one distinct fact to that is different from us is that we do have a postpetition claim. In December of 2018 we were called to ship approximately $850,000 worth of goods to the debtor, and it's very clear that's after the petition date, so these amounts are entitled to administrative expense priority, because they constitute postpetition transactions.

THE COURT: Has the debtor objected to that?

MS. WEYAND: At this time, we have not been paid and --

THE COURT: No, payment is another story.

MS. WEYAND: I don't have an objection in writing, no.

THE COURT: Okay.

MR. FAIL: Your Honor, Garrett Fail for the record. I think we said in our pleadings to the extent that the invoices match books and records we believe it would be entitled to administrative expense priority. We haven't done the reconciliation, there were thousands of vendors,

and as Your Honor knows, the debtors have transferred their employees to the buyer who have other responsibilities, and we're working the best we can to do reconciliation. But the best use of -- and the best efficiency is not going to be obtained by responding to one-off inquiries.

So we don't dispute that this is a postpetition payment, and we said in our reply that this is tied up with our dispute with the buyer in terms of the postpetition liabilities that we believe the buyer has assumed.

MS. WEYAND: And, Your Honor, may we just ask for some clarity on this issue as soon as possible.

THE COURT: Okay.

MS. WEYAND: Thank you.

THE COURT: So is anyone looking for payment, immediate payment? Are you looking for immediate payment? I'm trying to figure --

MS. WEYAND: If Your Honor is inclined to grant it, then yes.

THE COURT: Okay. All right.

MR. FAIL: Your Honor, and so then we would oppose that request --

THE COURT: Right.

MR. FAIL: -- for the reasons set forth in our pleading --

THE COURT: Any objection.

MR. FAIL: -- and the obvious facts.

THE COURT: Okay.

MR. SARACHEK: We were, Your Honor.

THE COURT: Okay.

MR. SARACHEK: Mien was.

THE COURT: Okay.

MR. SARACHEK: Of $14,000.

THE COURT: Okay. Well, all right, anyone else?

(No response)

THE COURT: Okay. I have before me a number of motions by trade creditors, vendors of the debtors, for the allowance and payment of an administrative expense under Section 503(b)(1) of the Bankruptcy Code.

As I noted during oral argument, a couple of those motions seek also immediate payment of the administrative expense, to the extent that it is allowed.

There are three orders in place in this case that are relevant to these motions. There's a final order authorizing the debtors to pay prepetition claims and confirm administrative expense priority for prepetition orders, to move into the debtors' postpetition and satisfy such obligations in the ordinary course of business, that's dated November 20th, 2018.

There is an order dated February 22nd, 2019 that in part has procedures for resolving claims under Section

503(b)(9) of the Bankruptcy Code as well as asserting -- requiring that those claims be asserted by the bar date.

And then finally there's an order dated March 28th, 2019 dealing with claim objection procedures generally.

One common issue has been raised in the motions that I read as an attempt to move certain claims that may or may not be 503(b)(9) claims (which if allowed are, in fact, accorded an administrative expense priority on the same level as 503(b)(1) claims, but under my February order, need to be resolved pursuant to the procedures in that order).

One aspect again of the motions before me seeks to take claims that might fall under 503(b)(9), because the agreement under which the claim, the goods were provided was a prepetition agreement, into the 503(b)(1) category.

In addition to that, and in addition to the couple of motions that seek immediate payment of any allowed administrative expense claim, certain of the motions state that notwithstanding the prepetition nature of the transaction between the vendor and the debtor, the debtor engaged in certain conduct that turned that prepetition transaction into a postpetition administrative expense transaction under 503(b)(1), either based on the November 20th, 2018 order or other postpetition representations that were made to the particular vendor.

I have determined that that latter category of administrative expense claim cannot be decided today, but requires case-by-case determination based on the evidence applicable to the particular transaction or the particular vendor.

No claimant has the ability today to get that evidence before me, and I should therefore not consider that aspect of its argument today.

I can decide today the issue of whether any allowed administrative expense should be paid now and I will lay that out on the record, since there are a couple of requests for that. And the debtors have acknowledged that they will pay undisputed administrative expenses at some point, they just object to them being paid now.

It's well established that the timing of distributions for administrative expense payments other than at the close of the case under Section 1129(a)(9) of the Bankruptcy Code which requires unless agreed to a different treatment by the administrative expense creditor to be paid at the earlier -- I'm sorry, at the later of the effective date of the plan or the allowance of the claim, is within the discretion of the Court.

As the leading treatise on bankruptcy states, generally courts have held that the timing for payment of administrative claims is a matter to be determined within

the discretion of the bankruptcy court. Factors influencing the exercise of this discretion may include the status of the case, the ability of the debtor to pay such claims, and the particular needs of the administrative claimants, and the probability that future administrative claims may not be paid in full. The latter point is especially important. Courts generally recognize that the timing of an administrative expense payment should be used to ensure the orderly and equal distribution among creditors similarly situated, and the need to prevent a race to a debtor's assets, if there is a doubt as to the administrative solvency of the debtor overall. See generally In re Korea Cho Sun Daily Times, 337 B.R. 773, 784 (Bankr. E.D.N.Y 2005), and In re Shihai, 392 B.R. 62, 67 through 68 (Bankr. S.D.N.Y. 2008). See also In re Baptist Medical Center of New York, Inc., 52 B.R. 417, 421 (E.D.N.Y. 1985), aff'd, 781 F2d 973 (2d Cir. 1986).

In this case there is a serious question on a debtor-by-debtor level as to the debtors' administrative solvency, was readily -- particularly at this time where the purchaser of substantially all of the debtor's assets, Transform, has not made the payments under the asset purchase agreement. And, in addition, certain creditors have asserted very large administrative expenses under 507(b) of the Bankruptcy Code, which under the plain terms of that

section take priority over other administrative expenses under Section 507.

So in the exercise of my discretion I believe that it would be improper to direct the payment of any particular administrative expense at this point, even where, as is asserted, by Mien, M-I-E-N, one of the movants, that non-payment will have a material adverse effect on it. That is one of the factors a court should consider, but given the number of administrative expense creditors and the fact that non-payment will adversely affect any administrative expense creditor, I don't believe it is dispositive here.

I will also rule on the one remaining issue that was raised I believe in all of the pending motions, which is whether under the Bankruptcy Code a vendor who enters into a prepetition agreement with a debtor but delivers the goods so that they are actually received in the possession or constructive possession of the debtor postpetition, as a matter of law has a postpetition administrative expense claim under Section 503(b)(1) of the Bankruptcy Code.

The burden of proving entitlement to a priority payment as an administrative expense rests with the party requesting it. In re Bethlehem Steel Corp., 479 F3d 161, 172 (2d Cir. 2007). And unless there is a contrary policy under the Bankruptcy Code, a specific policy that is, specifically enunciated, the application of Section 503(b)(1) to a

particular set of facts should be narrowly construed because of the overriding policy that the debtors' limited resources will be equally distributed among the creditors and a hundred percent statutory priority violates that policy and takes money out of the general creditor body's pocket. See Trustees of Amalgamated Insurance Fund v McFarlin's, Inc., 789 F2d 98, 101 (2d Cir. 1986) -- I'm sorry at 100, (2d Cir. 1986) and In re Ace Elevator Company, Inc., 347 B.R. 473 (Bankr. S.D.N.Y. 2006).

As stated by the district court in In Re Hostess Brands, Inc., 498 B.R. 406 (S.D.N.Y. 2013), "The case law governing the grant of administrative expenses is well established in the Second Circuit. Section 507 of the Bankruptcy Code gives first priority to administrative expenses allowed under 11 U.S.C. Section 503(b) defined as including 'the actual necessary costs and expenses of preserving the estate including wages, salaries or commissions for services rendered after commencement of the case.' "An expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession, and only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor in possession in the operation of the business." Hostess, 499 B.R. at 411, quoting from McFarlin's, 789 F.2d at 101.

McFarlin's and Judge Ramos go on to say at the same page of Hostess, "A debt is not entitled to priority simply because the right to payment arises after the debtor in possession has begun managing the estate. Rather it must be a postpetition transaction between the claimant and the debtor in possession, and the considerations supporting the right to payment must have been both supplied to and beneficial to the debtor in possession in the operation of the business postpetition."

Here it was argued that Congress somehow changed that general rule supported by the plain language of Section 503(b), or derived from the plain language of Section 503(b)(1), when in 2005 it enacted Sections -- revised Sections 546 and 503(b)(9) of the Bankruptcy Code.

The movants contend that because it has been interpreted that a claim entitled to administrative expense under Section 503(b)(9) arises when the debtor or its agent takes physical possession of the goods, that physical possession of the goods being obtained postpetition also gives rise to an administrative expense under Section 503(b)(1) of the Code.

This argument is misguided. Section 503(b)(9) was special purpose, special interest legislation adopted specifically to favor dealers of goods as an exception to the general requirement under Section 503(b)(1), as

previously articulated by the McFarlin's and Hostess courts, that the transaction and the consideration both be with the debtor or debtor in possession postpetition.

503(b)(9) gives a priority based on prepetition conduct. And it is narrowly drafted and differently drafted than Section 503(b)(1). It uses a term which was the term construed by the 3rd Circuit upon which the movants rely on. In re World Imports Limited, 862 F3d 338 (3d Cir. 2017), to be focused on a specific word in that section, which does not appear in Section 503(b)(1). Section 503(b)(9) gives an administrative expense priority to the value -- "the value of any goods RECEIVED by the debtor within 20 days before the date of the commencement of the case under this title, in which goods have been sold to the debtor in the ordinary course of such debtor's business."

As was entirely appropriate, the Court in World Imports Limited interpreted the meaning of the word "received" in Section 503(b)(9), which was open to different interpretations because it's not defined in the Bankruptcy Code.

It determined, overruling the bankruptcy court and the district court, that "received" in Congress' mind must have meant the general use of that term in the then existing form of the Uniform Commercial Code. Therefore, it means taking physical possession of the goods either by the debtor

or its agent. Id. at Section -- at pages 343 through 344.

That section of the Code and that interpretation are entirely separate from what is the issue here, which is whether a claim arises under Section 503(b)(1) of the Code, and, therefore, it would not apply here under these facts.

(It's not clear to me whether the 2nd Circuit would adopt that interpretation, either, but that's in fact irrelevant for purposes of the matter before me today since no 503(b)(9) issues are before me.)

It's argued by the movants that interpreting Section 503(b)(9) according to its plain terms as would be based on the 3rd Circuit's interpretation of Section 503(b)(9) would lead to anomalous results where certain assets, certain goods, excuse me, delivered outside of either the applicable petition date or the 20-day window would not be entitled to a priority, or would be entitled to a priority.

Whether there was an anomalous result is insufficient, however, for me to conclude that Congress decided to change a long established interpretation of Section 503(b)(1), which it was obviously fully aware of when it enacted BAPCPA in 2005, to develop a special general rule under (b)(1) as opposed to (b)(9) for vendor claims. And, indeed, the courts have continued to apply the McFarlands' definition after 2005 including District Judge

Ramos in the Hostess case I quoted from, from 2013. It continues to be the case that a debtor in possession or trustee needs to engage in a postpetition transaction or postpetition conduct that then is, in addition, beneficial to the estate, to give rise to an administrative expense under Section 503(b)(1).

The mere fact of delivery postpetition where the transaction was entered into prepetition is insufficient to give rise to such a claim.

So I will deny that aspect of the motions without ruling on the others that I've reserved decision on. And the debtors can submit an order consistent with that. You don't need to formally settle an order, but you should circulate it to the movants.

MR. FAIL: Thank you very much, Your Honor.

THE COURT: Okay. That's the end of the agenda, correct?

MR. FAIL: That is the end of today's agenda.

THE COURT: Okay. Very well, thank you.

(Proceedings concluded at 1:27 p.m.)

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C E R T I F I C A T I O N

We, Sherri Lynn Breach and Sheila Orms, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sherri L. Breach

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